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## What is "Blowing in the Wind"? Reopening the Exclusionary Rule Debate

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## WHAT IS "BLOWING IN THE WIND"?<sup>†</sup> REOPENING THE EXCLUSIONARY RULE DEBATE

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### I. INTRODUCTION

*The right of the people to be secure in their persons, houses,  
papers, and effects, against unreasonable searches and sei-  
zures, shall not be violated . . . .*<sup>1</sup>

On June 15, 2006, the United States Supreme Court decided *Hudson v. Michigan*,<sup>2</sup> holding that "the exclusionary rule is inapplicable" to suppress evidence seized pursuant to the execution of a search warrant where the officers executing the warrant fail to knock and announce their presence before entering

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<sup>†</sup> State v. Savage, 906 A.2d 1054, 1088 (Md. 2006) (discussing *Hudson v. Michigan*, 126 S. Ct. 2159 (2006)).

<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> 126 S. Ct. 2159 (2006).

the dwelling: the knock-and-announce rule.<sup>3</sup> Within hours, Supreme Court watchers, reading “between the lines,”<sup>4</sup> questioned whether the exclusionary rule, suppressing evidence seized in violation of the Fourth Amendment, would continue as a remedy for violations of the Search and Seizure Clause.<sup>5</sup> Scholars describe *Hudson* as “eviscerat[ing] an essential remedy”<sup>6</sup> for Fourth Amendment violations and as a “rather ominous decision”<sup>7</sup> confirming that the United States Supreme Court is on a “path of assaulting privacy and civil liberties . . . .”<sup>8</sup>

The holding in *Hudson v. Michigan* can be characterized as a very narrow one,<sup>9</sup> so why has *Hudson* created so much concern? Does *Hudson v. Michigan* mark a drastic shift in the Supreme Court’s Fourth Amendment jurisprudence,<sup>10</sup> or is *Hudson* just another step in a long series of Supreme Court

<sup>3</sup> 126 S. Ct. at 2165.

<sup>4</sup> Lyle Denniston, *Analysis: Exclusionary Rule in Trouble*, Supreme Court of the United States Blog (June 15, 2006), [http://www.scotusblog.com/movabletype/archives/2006/06/analysis\\_exclus.html](http://www.scotusblog.com/movabletype/archives/2006/06/analysis_exclus.html) (last visited on Feb. 24, 2007).

<sup>5</sup> See, e.g., *id.*; Jennifer Yackley, Note, *Hudson v. Michigan: Has the Court Turned the Exclusionary Rule into the Exclusionary Exception?*, 30 HAMLINE L. REV. 409 (2007).

<sup>6</sup> Mitchell E. Kempker, Note, *The Knock-and-Announce Rule: An Illusory Hurdle or a Legitimate Law Enforcement Limitation?*, 71 MO. L. REV. 787, 787 (2006) (“On June 15, 2006, the United States Supreme Court eviscerated an essential remedy for violation of [the knock-and-announce] rule . . . .”); David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 304 (2006) (“The Death of an Ancient Privacy Protection”).

<sup>7</sup> Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 777 (2006) (discussing Supreme Court cases regarding the Fourth Amendment in the context of drug and terrorism prosecutions).

<sup>8</sup> *Id.* For similar reactions to *Hudson*, see, e.g., Moran, *supra* note 6, at 283 (stating, albeit somewhat facetiously, that “*Hudson v. Michigan* signals the end of the Fourth Amendment as we know it” (footnotes omitted)); Erwin Chemerinsky, *The Roberts Court and the Police*, 753 PLI/LIT 17, 19 (August 2006) (“Justice Scalia’s opinion left no doubt that there are four Justices on the current Court ready and willing to completely eliminate the exclusionary rule as a remedy for police violations of the Fourth Amendment.”); and Ashdown, *supra* note 7, at 778 (characterizing the majority’s analysis as having “portentous consequences”).

<sup>9</sup> See, e.g., *United States v. Southerland*, 466 F.3d 1083, 1083 (D.C. Cir. 2006) (“[T]he exclusionary rule [does] not apply to Fourth Amendment knock-and-announce violations . . . .”); *United States v. Mosley*, 454 F.3d 249, 259 n.15 (3d Cir. 2006) (Where “the illegality is restricted to a violation of the knock-and-announce rule, . . . no one, not even the owner, can suppress [the evidence].”); Denniston, *supra* note 4 (“The bare holding of the case is simple: if police have a warrant to search a home, and they enter in a way that violates their constitutional duty to knock first and announce themselves, the evidence turned up in the search can be used in a criminal prosecution.”).

<sup>10</sup> John D. Castiglione, *Hudson and Samson: The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63, 66 (2007) (“*Hudson* was the first shot across the bow in what promises to be a long campaign by the ‘conservative’ bloc of the Court to undermine, and ultimately overrule, the exclusionary rule as a remedy for Fourth Amendment violations.”).

decisions narrowing the protections of the Fourth Amendment?<sup>11</sup> Are commentators responding to the Supreme Court's 4-1 record of ruling for the police when deciding Fourth Amendment questions in the new Chief Justice's first term,<sup>12</sup> or are they reacting to Justice Scalia's broad-sweeping language in the opinion?<sup>13</sup> Or are commentators and scholars uncomfortable reconsidering assumptions upon which the exclusionary rule is based, assumptions that *Hudson* calls into question?<sup>14</sup>

*Hudson*'s critical impact on the exclusionary rule is that it reopens the debate over the necessity of the exclusionary rule, a debate that should be focused on present day circumstances. *Hudson v. Michigan*, at its core, does not mark a drastic change in the Supreme Court's Fourth Amendment jurisprudence; to determine whether the exclusionary rule should apply, the Supreme Court weighed the rule's deterrence benefits against its social costs.<sup>15</sup> Courts and commentators alike have expressed discomfort with the balancing of costs

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<sup>11</sup> See Ashdown, *supra* note 7, at 757-79 (surveying Supreme Court cases "to illustrate the threat to civil liberties" found in the Court's Fourth Amendment jurisprudence in the last thirty years); Castiglione, *supra* note 10, at 82 ("Carving exceptions out of the exclusionary rule has been something of a pet project for the Court since the rule was incorporated to the states in *Mapp v. Ohio*.").

<sup>12</sup> See Chemerinsky, *supra* note 8, at 19 (discussing the Supreme Court's record in Fourth Amendment cases in Chief Justice John Roberts' first term); Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 527 n.132 (2006) ("The state prevailed in four out of the five Fourth Amendment cases decided just this last term . . ."). The Court ruled for law enforcement in *Hudson v. Michigan*, 126 S. Ct. 2159 (2006); *United States v. Grubbs*, 126 S. Ct. 1494 (2006); *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943 (2006); and *Samson v. California*, 126 S. Ct. 2193 (2006). Only in *Georgia v. Randolph*, 547 U.S. 103 (2006) did the defendant prevail in a Fourth Amendment case in Chief Justice Roberts's first term.

<sup>13</sup> See Denniston, *supra* note 4. He states that

[*Hudson v. Michigan*] suggests . . . new doubt about the continuing validity of the 'knock-and-announce' rule. Those implications seem to emerge in some of the language used, and certainly between the lines, of the ruling . . .

....

The Scalia opinion . . . relies on two fundamental theories, both of which pose questions about how far the decision may ultimately reach, or what future changes in constitutional doctrine it may portend.

*Id.*; see also Moran, *supra* note 6, at 307 ("It was . . . the evident hostility to the exclusionary rule permeating Justice Scalia's opinion for the Court that attracted the most attention to the decision in *Hudson*.").

<sup>14</sup> See Chris Blair, *Hudson v. Michigan: The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751, 756-59 (2007); Castiglione, *supra* note 10, at 65 ("[T]he continued vitality of one of the most well-established tenants of Fourth Amendment jurisprudence—the exclusionary rule—was back in play almost a century after it was established.").

<sup>15</sup> See Ashdown, *supra* note 7, at 778 (characterizing the *Hudson* opinion as "applying the *now familiar* analysis of balancing the advantages of applying the exclusionary rule to a particular constitutional violation against its social costs" (emphasis added)); see also *infra* Part II.C.

and benefits.<sup>16</sup> They have gone so far as suggesting that the critical questions about the necessity of the exclusionary rule have been answered and do not need to be reexamined.<sup>17</sup> *Hudson* has effectively reopened a long-standing debate regarding the benefits of the exclusionary rule: do adequate alternative remedies exist that diminish the need for the exclusionary rule?

A survey of lower-court decisions applying *Hudson* reveals that courts are uncomfortable with *Hudson*'s proposition that civil suits and police training diminish the need for the exclusionary rule.<sup>18</sup> However, the same courts rely on *Hudson*'s examination of the social costs of suppression to diminish the scope of the exclusionary rule.<sup>19</sup> This mixture of the extension of *Hudson* with the discomfort regarding *Hudson*'s proposed alternative remedies shows that the long-term effect of *Hudson* is not as clear as many have suggested. The debate, however, has been reopened, and initially it appears that the exclusionary rule will continue to narrow unless courts affirmatively and explicitly find that *Hudson*'s alternative remedies are not adequate.

In exploring these propositions, Part II will consider the purpose of the Fourth Amendment exclusionary rule, focusing on the development of the costs-benefits balancing test that the United States Supreme Court has applied to determine whether suppression of evidence is appropriate in various contexts. In order to better understand *Hudson*, Part III will review a brief history of the knock-and-announce rule. Against that backdrop, Part IV will review the opinions in the case of *Hudson v. Michigan*, with particular emphasis on Justice Scalia's application of the costs-benefits balancing test and related portions of the dissenting opinion. Part V will briefly consider the impact of *Hudson* on the knock-and-announce rule.<sup>20</sup> Finally, Part VI examines *Hudson*'s impact on the future of the exclusionary rule, proposing that *Hudson* has reopened the debate

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<sup>16</sup> See, e.g., *Hudson*, 126 S. Ct. at 2177 (Breyer, J., dissenting) ("The majority's 'substantial social costs' argument is an argument against the Fourth Amendment's exclusionary principle itself."); Chemerinsky, *supra* note 8, at 20 ("This argument has no stopping point; if followed, it would call for total elimination of the exclusionary rule."); *Fourth Amendment—Exclusionary Rule—“Knock-and-Announce” Violations*, 120 HARV. L. REV. 173, 174 (2006) [hereinafter *Fourth Amendment—Exclusionary Rule*] ("Because the majority's assertion that the costs of exclusion outweigh the benefits in this context is applicable to the exclusionary rule more broadly, the Court may rely on *Hudson* in the future to eliminate the rule altogether."); see also WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 1 Search & Seizure § 1.6 (4th ed. 2007) (stating that *Hudson*'s cost-benefits holding "is especially unfortunate, for it is open to broader application to other varieties of Fourth Amendment violations"); Denniston, *supra* note 4 ("Those forms of deterrent, of course, would not necessarily be at play only regarding the knock-and-announce rule. In a future case, involving a different right, they could be found to be equally persuasive alternatives to the exclusionary rule.").

<sup>17</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 931 (1984) (Brennan, J., dissenting).

<sup>18</sup> See *infra* Part VI.B.

<sup>19</sup> See *infra* Part VI.D.

<sup>20</sup> Several other scholars have recently published articles discussing *Hudson*'s impact on the knock-and-announce rule. See *infra* note 237. As such, this Note will briefly make several pertinent observations on this point.

on the necessity of the exclusionary rule and that the exclusionary rule will not survive this debate. In examining these propositions, Part VI will also survey lower-court reactions to *Hudson* as they relate to the future of the exclusionary rule and the debate over alternative remedies.

## II. THE FOURTH AMENDMENT EXCLUSIONARY RULE, IN BRIEF

The exclusionary rule, "mak[ing] evidence inadmissible in court if law enforcement officers obtained it by means forbidden by the Constitution, by statute or by court rules[.]"<sup>21</sup> exists in the context of several Constitutional provisions.<sup>22</sup> Relevant to the discussion of *Hudson v. Michigan* is the constitutional basis of the exclusionary rule in the context of the Fourth Amendment, as set forth in *Mapp v. Ohio*,<sup>23</sup> and the purpose<sup>24</sup> of the exclusionary rule in the Court's modern precedent.<sup>25</sup>

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<sup>21</sup> Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 665 (1970).

<sup>22</sup> *Id.* at 665. Specifically, Oaks separates the exclusionary rule into "four major types of violations[.]" including

searches and seizures that violate the fourth amendment, confessions obtained in violation of the fifth and sixth amendments, identification testimony obtained in violation of these amendments, and evidence obtained by methods so shocking that its use would violate the due process clause.

*Id.* For a listing of exemplar cases in each area, see *id.* at 665 n.1.

<sup>23</sup> 367 U.S. 643 (1961).

<sup>24</sup> The Supreme Court has not been clear in distinguishing between the constitutional *basis* of the exclusionary rule and its corresponding *purpose*. For example, in *Stone v. Powell*, 428 U.S. 465 (1976), Justice Powell referred to the rule's "deterrent purpose," but also stated that "[t]he primary *justification* for the exclusionary rule then is the deterrence." *Id.* at 486 (emphasis added). Then-retired Justice Stewart recognized the importance of distinguishing between the basis of the rule and its purpose when he examined three possible bases for the rule. Stewart, *infra* note 26, at 1380-89; see also Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1982-83) [hereinafter *Principled Basis*]. The importance of the distinction between basis and purpose becomes apparent upon examining the effect that the basis for the rule has on its scope and its long-term validity. Part of the reasoning in *Stone v. Powell*, 428 U.S. at 465, examining one possible basis for the exclusionary rule, exemplifies the relationship between basis and purpose. There, the Court rejected the "imperative of judicial integrity" as the basis for the exclusionary rule. *Id.* at 485 (quotations omitted) (citations omitted). Justice Powell rejected this basis for the exclusionary rule because it did not explain the scope or purpose of the rule: "Logically extended [the imperative of judicial integrity] justification would require that courts exclude unconstitutionally seized evidence despite lack of objection by the defendant, or even over his assent." *Id.* While Justice Powell worked backwards from the scope of the rule to understand the "limited role" of the imperative of judicial integrity as a basis for the rule, his logic nonetheless shows the importance of the distinction: the basis underpinning the rule defines the purpose of the rule. *Id.* But see Castiglione, *supra* note 10, at 98-100 (asserting that the judicial integrity should continue to require suppression).

<sup>25</sup> As Professor Yale Kamisar notes, "There is a vast literature on this subject." Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 119 n.1

### A. *Application of the Exclusionary Rule to the States*

As stated by then-retired Justice Potter Stewart, “the fourth amendment itself says nothing about the exclusion of illegally obtained evidence.”<sup>26</sup> Furthermore, early exclusionary rule cases did not discuss whether the rule should exist, nor did they focus on basis for the rule.<sup>27</sup> The cases about which Justice Stewart spoke, *Boyd v. United States*,<sup>28</sup> *Adams v. New York*,<sup>29</sup> and *Weeks v. United States*,<sup>30</sup> preceded the Court’s decision to apply the exclusionary rule to the states through the Fourteenth Amendment by as much as seventy-five years.<sup>31</sup> In those cases, suppression of evidence was based on the “fifth amendment’s ban on compulsory testimony”<sup>32</sup> and “the fourth amendment’s mandate that the government return wrongfully seized property.”<sup>33</sup> However, by *Mapp v. Ohio*, the Court’s view of the exclusionary rule had “significantly broadened.”<sup>34</sup>

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(2003) (containing a selective bibliography of articles providing “a good sampling” in the search and seizure exclusionary rule area).

<sup>26</sup> Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1372 (1983); accord *United States v. Leon*, 468 U.S. 897, 906 (1984) (“The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands . . .”). But see *United States v. Leon*, 468 U.S. at 932 (Brennan, J., dissenting) (“[A]s critics of the exclusionary rule never tire of repeating, the Fourth Amendment makes no express provision for the exclusion of evidence secured in violation of its commands. A short answer to this claim, of course, is that many of the Constitution’s most vital imperatives are stated in general terms and the task of giving meaning to these precepts is therefore left to subsequent judicial decisionmaking in the context of concrete cases.” (footnotes omitted)); Yale Kamisar, *Principled Basis*, *supra* note 24, at 581-89 (“The Constitution Says Nothing About An Exclusionary Rule—But It Has Nothing to Say About a Great Many Things.”).

<sup>27</sup> Stewart, *supra* note 26, at 1372 (1983). Justice Stewart discusses “three cases [through which] the rule was established,” specifically, *Boyd v. United States*, 116 U.S. 616 (1886), *Adams v. New York*, 192 U.S. 585 (1904), and *Weeks v. United States*, 232 U.S. 383 (1914). For another view of the early development of the exclusionary rule and its related justifications, see Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 263-70 (1998). For a well-reasoned critical view of the justifications of the exclusionary rule, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

<sup>28</sup> 116 U.S. 616 (1886).

<sup>29</sup> 192 U.S. 585 (1904).

<sup>30</sup> 232 U.S. 383 (1914).

<sup>31</sup> See cases cited *supra* notes 28-30; *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary rule to states); see also *Wolf v. Colorado*, 338 U.S. 25 (1949) (declining to extend exclusionary rule to states).

<sup>32</sup> Stewart, *supra* note 26, at 1375; see also *id.* at 1373 (stating that, in *Boyd*, exclusion was “injected . . . into the picture by . . . the ‘intimate relation’ between the fourth and fifth amendments” (quoting *Boyd*, 116 U.S. at 633)).

<sup>33</sup> Stewart, *supra* note 26, at 1375.

<sup>34</sup> *Id.* at 1375 (noting developments in the cases of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) and *Gouled v. United States*, 255 U.S. 298 (1921)).

Over a decade before *Mapp*, in *Wolf v. Colorado*<sup>35</sup> the Court held that the *protections* of the Fourth Amendment were incorporated against the states through the Fourteenth Amendment Due Process Clause.<sup>36</sup> In other words, the protections from unreasonable searches and seizures would not apply only to federal actions but also to state actions.<sup>37</sup> Having held the rights of the Fourth Amendment applicable against the states, the Court nonetheless held that the exclusionary rule, as a remedy, was not applicable to the states:

Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon *other methods* which, if consistently enforced, would be *equally effective*.<sup>38</sup>

In a later opinion, the Court "indicated that such should not be done until the States had 'adequate opportunity to adopt or reject the [exclusionary] rule.'"<sup>39</sup> Essentially, states had an opportunity to establish adequate alternative remedies to ensure that the protections of the search and seizure clause were not an "empty promise."<sup>40</sup>

Twelve years later in *Mapp v. Ohio*, however, the Court essentially rejected the existence of adequate alternative remedies to the exclusionary rule, referring to "[t]he obvious futility" of securing the Fourth Amendment protections through "other remedies."<sup>41</sup> Justice Frankfurter eloquently stated:

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the [exclusionary] rule the assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed

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<sup>35</sup> 338 U.S. 25 (1949).

<sup>36</sup> *Wolf*, 338 U.S. at 27-28.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 31 (emphasis added).

<sup>39</sup> *Mapp v. Ohio*, 367 U.S. 643, 654 (1961) (quoting *Irvine v. California*, 347 U.S. 128, 134 (1954)).

<sup>40</sup> *Id.* at 660.

<sup>41</sup> *Id.* at 652.



from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom implicit in the concept of ordered liberty.<sup>42</sup>

Without suppression, the Constitution would "grant the right but in reality . . . withhold its privilege and enjoyment."<sup>43</sup> On this reasoning,<sup>44</sup> the exclusionary rule was held to be "an essential part of the right to privacy," a "new constitutional right," and the Fourth Amendment's "most important constitutional privilege."<sup>45</sup>

The Court in *Mapp* relied on at least two rationales for the exclusionary rule: deterrence<sup>46</sup> and "the imperative of judicial integrity."<sup>47</sup> The exclusionary rule would ensure enjoyment of the rights noted above through deterrence: "compel[ling] respect for the constitutional guaranty in the *only effectively available way*—by removing the incentive to disregard it."<sup>48</sup> With regard to the imperative of judicial integrity, the court would not condone illegal activity by using the fruits of those activities at trial.<sup>49</sup> Based on these two rationales,<sup>50</sup>

<sup>42</sup> *Id.* at 655 (citations omitted) (quotation marks omitted).

<sup>43</sup> *Id.* at 656.

<sup>44</sup> Notably, this reasoning did not command a majority of the Court in *Mapp*. Justice Black, who constituted the fifth vote for the majority, was "not persuaded that the Fourth Amendment, standing alone, would be enough" to require exclusion of evidence. *Id.* at 661 (Black, J., concurring). He looked to the "close interrelationship between the Fourth and Fifth Amendments" to find a "basis . . . which not only justifies but actually requires the exclusionary rule." *Id.* at 662 (Black, J., concurring); *see also* *Stone v. Powell*, 428 U.S. 465, 484-85 n.21 (1976) ("Only four Justices adopted the view that the Fourth Amendment itself requires the exclusion of unconstitutionally seized evidence in state criminal trials. Mr. Justice Black adhered to his view that the Fourth Amendment, standing alone, was not sufficient, but concluded that, when the Fourth Amendment is considered in conjunction with the Fifth Amendment ban against compelled self-incrimination, a constitutional basis emerges for requiring exclusion." (internal citations omitted)). This reasoning hearkens back to the reasoning employed in *Boyd v. United States*. *See supra* note 32 and accompanying text.

<sup>45</sup> *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

<sup>46</sup> *Id.* at 656.

<sup>47</sup> *Id.* at 659.

<sup>48</sup> *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)) (emphasis added).

<sup>49</sup> *Id.* at 659 (quoting *Elkins*, 364 U.S. at 222).

<sup>50</sup> The actual reasons upon which *Mapp* was based are a subject that is debated as widely as any other aspect of the exclusionary rule. Justice Brennan, dissenting in *United States v. Callandra*, 414 U.S. 338, 357 (1974), asserted that *Mapp* was based on deterrence and judicial integrity, calling them "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." In contrast, Professor Norton asserts that Justice Clark's majority opinion in *Mapp* stated at least five justifications. Norton, *supra* note 27, at 262-65. The first was found in the interrelationship of the fourth and fifth amendments. *Id.* at 264. Professor Norton finds this justification in the fact that the majority cites to *Boyd v. United States*, 116 U.S. 616 (1886). Norton, *supra* note 27, at 264. It is worth noting, however, that the

Justice Frankfurter held in expansive terms: "We hold that *all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, *inadmissible* in a state court."<sup>51</sup>

The time between *Wolf* and *Mapp*, just twelve years, was small by constitutional standards. It appears that one vital, judicially-found fact, or "judicial understanding,"<sup>52</sup> changed between *Wolf* and *Mapp*: whether or not adequate alternative remedies existed to safeguard the protections of the Fourth Amendment.<sup>53</sup> In *Wolf* the Court reasoned that states would be able to implement "equally effective" alternatives to suppression of evidence.<sup>54</sup> However, in *Mapp* the Court specifically changed its finding in this regard: "It . . . plainly appears that the *factual considerations* supporting the failure of the *Wolf* Court to include the . . . exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, . . . could not, in any analysis, now be deemed controlling."<sup>55</sup>

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majority does not specifically state this justification, and the omission appears to have been glaring enough that Justice Black wrote his separate concurring opinion to state this justification. This Author, therefore, disagrees that this justification was relied upon by the majority opinion; regardless, this justification was rejected in *United States v. Leon*, 468 U.S. 897, 906 (1984) ("The Fifth Amendment theory has not withstood critical analysis or the test of time . . ."). Professor Norton's second justification was "basic due process"—where there is a right there is a remedy. *Id.* at 265; *see also id.* at 262. The third justification, according to Professor Norton, is "the imperative of judicial integrity." *Id.* at 265 (internal quotation marks omitted) (citations omitted). This justification was strongly undermined in at least two opinions written by Justice Powell, starting in 1974 with *United States v. Calandra*, 414 U.S. 338 (1974). *See Stewart, supra* note 26, at 1390-91. Justice Powell examined and rejected the effectiveness of this justification explicitly in *Stone v. Powell*, 428 U.S. 465 (1976). There, Justice Powell concluded: "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Id.* at 485; *see also Stewart, supra* note 26, at 1383 ("I do not believe that [preserving judicial integrity] can justify making the exclusionary rule mandatory on the states."). "[The] fourth justification for the exclusionary rule [is] deterrence." *Id.* at 265. Finally, at the heart of Professor Norton's article is the fifth justification he finds in *Mapp*'s majority: "restoration of the status quo ante." *Id.* at 266. *See also Stewart, supra* note 26, at 1380 (finding three categories of constitutional bases for the exclusionary rule with support in *Mapp*: "exclusion mandated directly by the Constitution, exclusion to preserve the integrity of the government, and exclusion as a constitutionally required remedy").

<sup>51</sup> *Mapp*, 367 U.S. at 655 (emphasis added).

<sup>52</sup> *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

<sup>53</sup> This assertion is supported by examining the pre-*Mapp* exclusionary rule decisions of then-Judge Cardozo of the New York Court of Appeals and Judge Traynor of the California Supreme Court, rejecting and accepting the exclusionary rule respectively. Each opinion turned in large part on assumptions about the existence and effectiveness of alternate remedies. *Compare* *People v. Defore*, 150 N.E. 585, 586-87 (N.Y. 1926) ("The officer might have been resisted, or sued for damages, or even prosecuted for oppression. He was subject to removal or other discipline at the hands of his superiors. These consequences are *undisputed*." (internal citations omitted) (emphasis added)) with *People v. Cahan*, 282 P.2d 905, 913 (Cal. 1955) ("Experience has demonstrated . . . that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures.").

<sup>54</sup> *Wolf v. Colorado*, 338 U.S. 25, 31 (1949).

<sup>55</sup> *Mapp*, 367 U.S. at 653 (emphasis added).

The factual considerations to which Justice Frankfurter referred to in the above passage included the existence of alternative remedies.<sup>56</sup> Upon concluding that there were no adequate alternative remedies at the time of *Mapp*, the Court found the exclusionary rule necessary to ensure that the protections of the Fourth Amendment were not an empty promise.<sup>57</sup> It can thus be said that the existence of adequate alternative remedies may be the “touchstone of the inquiry”<sup>58</sup> in determining whether and to what extent the exclusionary rule should apply to the states.<sup>59</sup> As discussed below, existence of adequate alternative remedies continues to be, while not an exclusive consideration, an important consideration in the Court’s post-*Mapp* decisions regarding the exclusionary rule.<sup>60</sup>

### B. *The Deterrence Rationale for the Exclusionary Rule*

The modern purpose of suppressing unlawfully seized evidence is “to deter—to compel respect for the constitutional guaranty in the only effectively

<sup>56</sup> *Id.* at 651-52.

<sup>57</sup> *Supra* notes 42-43 and accompanying text.

<sup>58</sup> The author borrows this phrase from *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 900 (5th Cir. 1977) (discussing exemptions from regulation under the Securities Act of 1933), a case in securities law. Justice Stewart used the phrase “The Focus of the Inquiry” when discussing alternative remedies. Stewart, *supra* note 26, at 1385. However, his use of the phrase was slightly different. There, he was not stating that the “existence of adequate alternative remedies” was the focus of the inquiry so much as the focus upon examining those alternative remedies was to look at “the present, not the past.” *Id.* Justice Powell did, however, support this Note’s assertion that the “keystone of the inquiry” is the existence of adequate alternative remedies when he stated that “the Constitution requires only that there be some *effective* remedy to ensure that agents of the government obey the fourth amendment. Thus *exclusion is constitutionally required only if without it there would be no adequate means to ensure that the government obeys the fourth amendment.*” *Id.* (second emphasis added).

<sup>59</sup> See *Franks v. Delaware*, 438 U.S. 154, 171 (1978) (“[T]he Court has not questioned, in the *absence of a more efficacious sanction*, the continued application of the rule.” (emphasis added)); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting) (“If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule.”). A cursory glance at the scholarly debate surrounding the exclusionary rule supports the assertion that the existence of adequate alternative remedies was the touchstone of the inquiry in determining whether the exclusionary rule should apply to the states. See, e.g., Stewart, *supra* note 26, at 1385 (stating that “[i]n considering whether the exclusionary rule is constitutionally required, the inquiry into the existence of *adequate alternative remedies* must examine the present, not the past” (second emphasis added)); Amar, *supra* note 27, at 785-87 (discussing tort remedies in historical context of Fourth Amendment); Kamisar, *In Defense*, *supra* note 25, 123 (stating that “impressive evidence of the ineffectiveness of the so-called alternatives to the exclusionary rule does exist”); Stewart, *supra* note 26, at 1388-89 (asserting that “available alternatives to the exclusionary rule . . . do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations”); see also LAFAYE, *supra* note 16, at § 1.6 (discussing “remedies . . . which are uniquely directed to the protection of constitutional rights”).

<sup>60</sup> See *infra* Part II.A.2.

available way—by removing the incentive to disregard it.”<sup>61</sup> As such, the exclusionary rule does not repair damage done by a violation of the Fourth

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<sup>61</sup> *Mapp*, 367 U.S. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)) (emphasis added); see also *Hudson v. Michigan*, 126 S. Ct. 2159, 2165-66 (2006) (discussing deterrence in context of knock-and-announce rule); *United States v. Calandra*, 414 U.S. 338, 347 (1974) (stating that “the rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures”); *Stone v. Powell*, 428 U.S. 465, 484, 486 (1976) (stating that *Mapp* “relied principally upon the belief that exclusion would deter future unlawful police conduct” and that “[t]he primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights”); *Elkins*, 364 U.S. at 217 (stating that “[t]he rule is calculated to prevent, not to repair”); see also Norton, *supra* note 27, at 270-80 (discussing deterrence).

This Note does not assert that deterrence is the only purpose to be read from the Supreme Court’s decisions, nor does this Note assert that deterrence *should* be the purpose of the exclusionary rule. These questions are, as with other aspects of the exclusionary rule, subject to great debate. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984) (“[T]he prime purpose of the exclusionary rule . . . is to deter future unlawful police conduct . . .”) (quoting *United States v. Janis*, 428 U.S. 433, 446 (1976)) (internal quotation marks omitted); *id.* at 1051 (Brennan, J., dissenting) (“I believe the basis for the exclusionary rule does not derive from its effectiveness as a deterrent . . .”); *United States v. Harju*, 466 F.3d 602, 605 (7th Cir. 2006) (“[C]ommentators have articulated several purposes served by the rule . . . [including] deterrence, judicial integrity and popular trust in government . . .”); Norton, *supra* note 27, at 283-94 (proposing and arguing for an alternate “restorative” purpose for the exclusionary rule); Amar, *First Principles*, *supra* note 26, at 800 (rejecting the exclusionary rule as a sound constitutional rule “even if [it] achieves short-term deterrence”); *id.* at 796-800 (discussing and rejecting deterrence rationale).

Furthermore, justices and commentators have disputed whether the exclusionary rule actually accomplishes the purpose of deterrence. See generally *Stone*, 428 U.S. at 492 & n.32 (“Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it.” (emphasis added) (footnotes omitted)); *United States v. Calandra*, 414 U.S. 338, 348 n.5 (1974) (“There is some disagreement as to the practical efficacy of the exclusionary rule . . .”); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368-69 & n.6 (1999) (“No one is going to win the empirical debate over whether the exclusionary rule deters the police from committing a significant number of illegal searches and seizures.”). For a well-known and oft-cited empirical study that concludes that the deterrent effect of the exclusionary rule is unknown, see Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 720 (1970) (examining, in part, “probable limitations upon the effectiveness of the exclusionary rule as a means to deter illegal searches and seizures”).

At different times the Court has discussed deterrence as the “justification” for the exclusionary rule versus the “purpose” of the exclusionary rule. Compare *Stone*, 428 U.S. at 486 (“The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.” (emphasis added)) with *id.* at 486 (“But despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.” (emphasis added)). It appears that while at the time of *Mapp* the primary justification was the lack of adequate alternative remedies, the Court’s analysis has turned primarily to an examination of deterrence, with alternative remedies becoming simply a factor to examine within the deterrence framework. See *infra* Part II.B.

Amendment.<sup>62</sup> The rule's suppression of evidence is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."<sup>63</sup>

Given the strong language of the Court in *Mapp*—the majority opinion spoke in terms of constitutional *rights* and *privileges* derived from the Fourth Amendment<sup>64</sup>—scholars and judges have criticized the Court's practically exclusive focus on deterrence as the rule's purpose in post-*Mapp* exclusionary rule decisions.<sup>65</sup> While deterrence was discussed in *Mapp*, it was not the focus.<sup>66</sup> Post-*Mapp* cases, however, firmly establish that deterrence is the modern purpose of the exclusionary rule.<sup>67</sup>

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<sup>62</sup> United States v. Leon, 468 U.S. 897, 906 (1984) ("[T]he exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'" (citing *Stone*, 428 U.S. at 540 (White, J., dissenting))); *Stone*, 428 U.S. at 486 ("Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any reparation comes too late." (alterations omitted) (citations omitted)); *Linkletter v. Walker*, 381 U.S. 618, 637 (1965) ("[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."), *disapproved of on other grounds by* *Griffith v. Kentucky*, 479 U.S. 314 (1987); *Elkins*, 364 U.S. at 217 ("The rule is calculated to prevent, not to repair."); *see also Janis*, 428 U.S. at 443 n.12 (citing cases supporting the same).

<sup>63</sup> *Leon*, 468 U.S. at 906 (quoting *Calandra*, 414 U.S. at 348); *see also Stewart*, *supra* note 26, at 1390.

<sup>64</sup> *See supra* note 45 and accompanying text.

<sup>65</sup> *See, e.g., Calandra*, 414 U.S. at 356 (Brennan, J., dissenting) ("This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule."); *Norton*, *supra* note 27, at 266 ("[T]he Court in *Mapp* devoted little attention to deterrence as a justification for the exclusionary rule . . .").

<sup>66</sup> *See supra* notes 46-50 and accompanying text.

<sup>67</sup> *See Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) ("The exclusionary rule is . . . a judicially created means of deterring illegal searches and seizures."); *Leon*, 468 U.S. at 906 ("The rule . . . operates . . . through its deterrent effect . . ."); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1053 (1984) (White, J., dissenting) ("The exclusionary rule rests on the Court's belief that exclusion has a sufficient deterrent effect to justify its imposition, and the Court has not abandoned the rule."); *Calandra*, 414 U.S. at 347 ("[T]he rule's prime purpose is to deter future unlawful police conduct . . ."); *see also Norton*, *supra* note 27, at 266 (noting that the Court has "assigned increasing significance to deterrence" starting with the very first exclusionary rule case after *Mapp*). It should also be noted that *Mapp* itself cited to *Elkins v. United States*, 364 U.S. 206, 217 (1960) for the proposition that the purpose of the exclusionary rule is deterrence. *See infra* note 86 and accompanying text.

C. *Determining the Scope of the Exclusionary Rule: A Delicate Balance of Social Costs and Deterrence Benefits*

As early as 1969,<sup>68</sup> the United States Supreme Court began to develop the modern test for determining whether to apply the exclusionary rule in a particular situation or proceeding.<sup>69</sup> Shortly thereafter, in the 1974 decision of *United States v. Calandra*, the Court ignored the rationale of judicial integrity and shifted primarily to the deterrence rationale,<sup>70</sup> formulating the modern test for determining whether the rule should apply in any given situation: to determine whether the exclusionary rule should apply, the "potential injury" of suppressing reliable evidence of guilt must be weighed "against the incremental deterrent effect" of rule's application.<sup>71</sup>

A brief review of three cases assists in the understanding of the Court's cost-benefits balancing. In the first case, *United States v. Calandra*, the Court first explicitly balanced the costs and benefits of exclusion.<sup>72</sup> The next two cases, *United States v. Leon*<sup>73</sup> and *INS v. Lopez-Mendoza*,<sup>74</sup> are applications of the *Calandra* balancing test. Examining the birth of the balancing test and its application frames the discussion of *Hudson*'s impact on the exclusionary rule jurisprudence.<sup>75</sup>

<sup>68</sup> See *Alderman v. United States*, 394 U.S. 165, 174-75 (1969) ("[W]e are not convinced that the *additional benefits* of extending the exclusionary rule to other defendants would *justify further encroachment upon the public interest* . . . ." (emphasis added)); see also *infra* note 69.

<sup>69</sup> Stewart, *supra* note 26, at 1390.

<sup>70</sup> See Ashdown, *supra* note 7, at 759 (discussing the Court's "exclusive focus on the deterrent impact of the exclusionary rule—as opposed to the interest in judicial integrity").

<sup>71</sup> Stewart, *supra* note 26, at 1391; see *Calandra*, 414 U.S. at 350 (stating that the Court would "weigh the benefits to be derived from [the] proposed [application] of the exclusionary rule" with the "potential damage" or social cost occurring as a result of the application); see also Norton, *supra* note 27, at 272-73. The year before *Calandra*, the Court restricted operation of the exclusionary rule by allowing for stop-and-frisk encounters in *Terry v. Ohio*, 392 U.S. 1 (1968). The Court's language in *Terry* foreshadowed the test applied in *Calandra*. The Court noted that "in some contexts the rule is ineffective as a deterrent." *Id.* at 13. In light of limitations on the rule's deterrence value, the Court went on to state that "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Id.* at 15 (emphasis added). The Court here was examining what it would later make clear in *Calandra*: that the application of the exclusionary rule should not be applied blindly, but should be applied in light of the balancing of the social costs of its application against the rule's deterrence value. *Calandra*, 414 U.S. at 350.

<sup>72</sup> Stewart, *supra* note 26, at 1390-91; see also Norton, *supra* note 27, at 272 (stating that the Court began using the balancing approach "[b]eginning in earnest with *United States v. Calandra*").

<sup>73</sup> 468 U.S. 897 (1984).

<sup>74</sup> 468 U.S. 1032 (1984).

<sup>75</sup> There are many other cases that merit consideration on this point. See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 (1998) ("Application of the exclusionary rule would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative

*Calandra* decided whether the exclusionary rule applied to grand jury proceedings.<sup>76</sup> The Court clearly stated that “the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.”<sup>77</sup> To determine whether to apply the exclusionary rule to suppress evidence in grand jury proceedings, the Court weighed the costs against the benefits. On the side of costs, the Court did not explicitly consider the *general* social costs of the exclusionary rule, letting the guilty go free and suppressing reliable evidence, but rather considered social costs *specific* to the context of grand jury proceedings: (1) the “potential injury to the historic role and functions of the grand jury”<sup>78</sup> through “protracted interruption of grand jury proceedings”<sup>79</sup> and (2) “undu[e] interfere[nce] with the effective and expeditious discharge of the grand jury’s duties.”<sup>80</sup> Regarding the general social costs of the exclusionary rule, the Court simply referred to them as already “hav[ing] been considered.”<sup>81</sup>

On the side of benefits, the Court placed the “incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings[.]”<sup>82</sup> Given that *Mapp* excludes from the prosecution’s case-in-chief any evidence obtained in violation of the Fourth Amendment, “it is unrealistic to assume that application of the rule to grand jury proceedings would *significantly further* that goal”<sup>83</sup>:

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nature of parole revocation proceedings. The rule would provide only minimal deterrence benefits in this context, because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches. We therefore hold that the federal exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees’ Fourth Amendment rights.”); *United States v. Janis*, 428 U.S. 433, 454 (1976) (“In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule.”).

<sup>76</sup> 414 U.S. 338.

<sup>77</sup> *Id.* at 348.

<sup>78</sup> *Id.* at 349.

<sup>79</sup> *Id.* at 350 (quotations omitted) (citations omitted).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 351 (“The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment.” (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1974))).

<sup>82</sup> *Id.* at 351. Because the exclusionary rule already applied to evidence adduced at trial, extending the rule’s application to grand jury proceedings “would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation.” *Id.*

<sup>83</sup> *Id.* (emphasis added).

Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained.<sup>84</sup>

These “*additional* benefits”<sup>85</sup> of suppressing evidence in grand jury proceedings provided a value that the Court found “uncertain at best,” “speculative,” and “undoubtedly minimal.”<sup>86</sup> In conclusion, the Court held that the non-existent or de minimus deterrence benefits did not warrant “substantially impeding the role of the grand jury.”<sup>87</sup>

The Supreme Court has applied the *Calandra* balancing test to hold that

illegally obtained evidence could be used for impeachment; that evidence obtained in violation of a third party’s Fourth Amendment rights could be used against a defendant whose Fourth Amendment rights were not violated; that the testimony of witnesses located through illegal searches would not be suppressed as fruit of the poisonous tree; . . . that good-faith reliance on an unconstitutional substantive criminal statute would not lead to exclusion of evidence.<sup>88</sup>

*D. Applying the Balancing Test: United States v. Leon*

On July 5, 1984, the Court announced two cases applying the *Calandra* balancing test.<sup>89</sup> In *United States v. Leon*, the Court confronted an exclusionary rule issue well-anticipated by scholars and justices alike<sup>90</sup>:

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (quoting *Alderman*, 394 U.S. at 175) (emphasis added).

<sup>86</sup> *Id.* at 351-52.

<sup>87</sup> *Id.* at 352.

<sup>88</sup> Norton, *supra* note 27, at 273 (footnotes omitted); *see also id.* at 272 (stating that the Supreme Court has applied the “cost-benefit formula . . . like a mantra” in the years after *Calandra*); Stewart, *supra* note 26, at 1391.

<sup>89</sup> *United States v. Leon*, 468 U.S. 897 (1984); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).



whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.<sup>91</sup>

The Court set forth the *Calandra* balancing test as the standard to determine whether the exclusionary rule should apply to suppress evidence when a law enforcement officer has acted in good faith:

[This question] must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.<sup>92</sup>

The Court found the social costs to include (1) interfering with the role of the judge and jury<sup>93</sup> and (2) "allowing some guilty defendants to go free."<sup>94</sup> On the side of benefits, the Court found minimal deterrence: the specter of suppression is unlikely to deter a magistrate whose role is to issue the warrant<sup>95</sup> and the law enforcement officers who reasonably believe they are engaged in a lawful activity.<sup>96</sup> With these "substantial" general costs and only "marginal or non-existent" benefits,<sup>97</sup> the Court held that exclusion was inappropriate.<sup>98</sup>

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<sup>90</sup> See, e.g., Stewart, *supra* note 26, at 1399-1403 (discussing good-faith exception); Illinois v. Gates, 462 U.S. 213, 255 (1983) (White, J., concurring in judgment) ("These developments, born of years of experience with the exclusionary rule in operation, forcefully suggest that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.").

<sup>91</sup> *Leon*, 468 U.S. at 900.

<sup>92</sup> *Id.* at 906-07.

<sup>93</sup> *Id.* at 907 (quoting United States v. Payner, 447 U.S. 727, 734 (1980)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 917.

<sup>96</sup> *Id.* at 919. In so finding, the Court stated that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Id.* at 919 (quoting United States v. Peltier, 422 U.S. 531, 539 (1975)).

<sup>97</sup> *Id.* at 922.

<sup>98</sup> *Id.* at 926. Similarly strong words have been used to describe the exclusionary rule as a remedy. See, e.g., Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 369 (1998) (referring to the exclusionary rule as the "harsh deterrent of exclusion" (emphasis added)).

In *Leon*'s companion case, *INS v. Lopez-Mendoza*, the Court decided whether the exclusionary rule should apply to "civil deportation hearing[s]."<sup>99</sup> Applying the *Calandra* balancing test, the Court examined the potential deterrence benefits in the context of deportation hearings,<sup>100</sup> finding that the exclusionary rule would not "contribute materially" to deterring Fourth Amendment violations.<sup>101</sup> Against the finding of minimal deterrence, the Court weighed the social costs<sup>102</sup>, which the Court found to be "high."<sup>103</sup> Given the high costs and the low benefits, the Court held that exclusionary rule should not be applied.<sup>104</sup>

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<sup>99</sup> 468 U.S. 1032, 1034 (1984).

<sup>100</sup> *Id.* at 1042.

<sup>101</sup> *Id.* at 1046. Initially, the Court noted that the immigration officers who file civil deportation actions are often the same officials who violated the Fourth Amendment. *Id.* at 1043. This fact would weigh toward finding a high value of deterrence because the law enforcement officers who might lose their case for lack of evidence were those who violated the law. *Id.* ("[T]he exclusionary rule is likely to be most effective when applied to such 'intrasovereign' violations."); cf. *United States v. Janis*, 428 U.S. 433, 453-54 & n.27 (1976) (discounting deterrence value of suppressing evidence in *federal* civil proceeding where evidence was seized unlawfully by *state* law enforcement officers); but cf. *Elkins v. United States*, 364 U.S. 206, 208, 224 (1960) (holding that evidence seized in violation of the Fourth Amendment by state law enforcement officers is inadmissible in federal criminal trials, despite the fact that the violation and the suppression occurred in different sovereigns).

The Court, however, did not stop there but found the deterrence value reduced by four additional facts. *Lopez-Mendoza*, 468 U.S. at 1043. First, the Court found that deportation actions will often succeed even if the evidence is suppressed because the government need only prove "identity and alienage," both of which can often be proven without resort to the type of evidence that is suppressed. *Id.* With regard to identity, the Court noted that evidence of identity cannot be suppressed. *Id.* With regard to alienage, the Court referred to the flexibility officers had to prove this element, including use of inferences drawn from the suspected alien's silence and evidence seized lawfully or attenuated from the unlawful search or seizure. *Id.* Second, the Court found the deterrence value undermined based on the fact that very few illegal aliens received deportation hearings. *Id.* at 1044 ("Over 97.5% apparently agree to voluntary deportation without a formal hearing."). As such, "the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing." *Id.* The third factor discounting the value of deterrence was the existence of a "comprehensive scheme for deterring Fourth Amendment violations" at the INS, including Fourth Amendment training given to immigration officers; such training decreased the need for deterrence through suppression. *Id.* at 1044-45. Finally, the Court found that alternative remedies existed to diminish the likelihood of violations in the deportation context, including declaratory relief against potentially unconstitutional INS policies. *Id.* at 1045.

<sup>102</sup> The costs that the Court found were (1) permitting an illegal alien to continue committing the crime of being within the country illegally, *id.* at 1046-47; (2) interfering with the "simple . . . streamlined" system used by the INS for deportations, *id.* at 1048; and (3) excluding "large amounts of information that had been obtained . . . lawfully," *id.* at 1049.

<sup>103</sup> *Id.* at 1050.

<sup>104</sup> *Id.* at 1051. It is worth noting that Justice O'Connor limited the holding, suggesting that the Court was willing to revisit its conclusions if the need for deterrence became greater. *Id.* at 1050. ("Our *conclusions* concerning the exclusionary rule's value *might change*, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." (emphasis added)).

*Leon* and *Lopez-Mendoza* raise several key points about the exclusionary rule. As a general matter, these decisions evidence the difficult and unclear nature of applying the *Calandra* balancing test, a standard requiring the weighing and quantifying of concepts as nebulous as “social costs” and “deterrence benefits.”<sup>105</sup>

*Leon* and *Lopez-Mendoza* both applied the costs-balancing test, and both came out in favor of limiting the scope of the exclusionary rule.<sup>106</sup> Emblematic of the difficulty of applying the balancing test is the fact that Justice White, who wrote the majority opinion in *Leon*,<sup>107</sup> wrote a strong dissent in *Lopez-Mendoza*.<sup>108</sup> His stance with the majority on the one hand, the scope of the exclusionary rule, and his dissent on the other, opposing a limitation on the rule, show the difficulty, and possibly the unmanageability, of balancing costs and benefits to determine the scope of the exclusionary rule. Justice White wrote in *Leon* that “the extreme sanction of exclusion”<sup>109</sup> should not apply because the “marginal or nonexistent benefits” did not “justify the substantial costs of exclusion” in the context of the good-faith exception.<sup>110</sup> The decision required a “weighing [of] the costs and benefits” of the previously mentioned factors to determine the result.<sup>111</sup> In *Lopez-Mendoza* he wrote in dissent, “the conclusion of the majority is based upon an *incorrect assessment* of the costs and benefits . . . .”<sup>112</sup>

The Author does not suggest that Justice White was in any way applying contradictory standards in his two opinions; rather, Justice White’s differing opinions on the results of the cost-benefits balance in two decisions issued on the same day reflect the difficulty of making these decisions. The “weighing” performed by Justice White in *Leon* and the “assessment” with which he disagreed in *Lopez-Mendoza* show that the outcome of the application of the costs-benefits balancing test will often be determined by a value judgment; such value judgments are both prone to vociferous attack and are core to the Supreme Court’s current exclusionary rule jurisprudence.

The difficulty of applying the balancing test may underlie the inclination of some justices to prescribe rules to define the scope of the exclusionary

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<sup>105</sup> More cynically, these two cases show that applying a standard requiring balancing of costs and benefits leaves judges with remarkable amounts of discretion. Cf. Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1295 (2006) (asserting that balancing of costs and benefits to determine whether a particular standard is judicially manageable leaves a court in that balancing step with the very discretion that courts seek to limit by seeking judicially manageable standards).

<sup>106</sup> See *supra* Part II.C (discussing *Leon* and *Lopez-Mendoza*).

<sup>107</sup> *United States v. Leon*, 468 U.S. 897, 897 (1984).

<sup>108</sup> *Lopez-Mendoza*, 468 U.S. at 1052-60 (White, J., dissenting).

<sup>109</sup> *Leon*, 468 U.S. at 926.

<sup>110</sup> *Id.* at 922.

<sup>111</sup> *Id.* at 907 (emphasis added).

<sup>112</sup> *Lopez-Mendoza*, 468 U.S. at 1052 (White, J., dissenting) (emphasis added).

rule, discarding then the costs-benefits balancing standard.<sup>113</sup> However, *Leon* and *Lopez-Mendoza* show that the Court has continued to apply a costs-benefits balancing. Recognizing the difficulty of applying the *Calandra* test, Justice Blackmun stated:

If a single principle may be drawn from this Court's exclusionary rule decisions, . . . it is that the scope of the exclusionary rule is *subject to change in light of changing judicial understanding* about the effects of the rule outside the confines of the courtroom.<sup>114</sup>

Justice O'Connor's similar statement in *Lopez-Mendoza*<sup>115</sup> supports the assertion that the Court is willing to reevaluate its exclusionary rule decisions and the assumptions underlying their scope.

The difficulty of applying the *Calandra* balancing test<sup>116</sup> militates for a clear understanding of what factors the Court places on the side of costs and the side of benefits. On the side of costs, while *Calandra* did not explicitly weigh the general social costs of the exclusionary rule,<sup>117</sup> *Leon* squarely considered the

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<sup>113</sup> For example, Justice White sought to differentiate between "collateral" and non-collateral proceedings in distinguishing *Lopez-Mendoza* from *Calandra* and other precedents. *Id.* at 1053 (White, J., dissenting). Justice Brennan excoriated the balancing test, stating,

The Court seeks to justify this result on the ground that the "costs" of adhering to the exclusionary rule in cases like those before us exceed the "benefits." *But the language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect.* It creates an *illusion* of technical precision and ineluctability. It suggests that not only constitutional principle but also empirical data support the majority's result. When the Court's analysis is examined carefully, however, it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the "costs" of excluding illegally obtained evidence loom to exaggerated heights and where the "benefits" of such exclusion are made to disappear with a mere wave of the hand.

*Leon*, 468 U.S. at 929 (1984) (Brennan, J., dissenting) (emphasis added). Justice Brennan further stated,

Thus, in this bit of judicial stagecraft, while the sets sometimes change, the actors always have the same lines. Given this well-rehearsed pattern, one might have predicted with some assurance how the present case would unfold. First there is the ritual incantation of the "substantial social costs" exacted by the exclusionary rule, followed by the virtually foreordained conclusion that, given the marginal benefits, application of the rule in the circumstances of these cases is not warranted.

*Id.* at 928.

<sup>114</sup> *Id.* (Blackmun, J., concurring) (emphasis added) (citations omitted).

<sup>115</sup> *Supra* note 104.

<sup>116</sup> *Supra* notes 105-15 and accompanying text.

<sup>117</sup> *See supra* note 81 and accompanying text.

general social costs of the exclusionary rule in evaluating the costs of suppression in the context of the good-faith exception.<sup>118</sup> Explicit consideration of these general social costs tends to greatly favor limitation of the exclusionary rule.<sup>119</sup>

*Leon* was not the first post-*Mapp* case in which the Court placed the general social costs on the “costs” side of the balance.<sup>120</sup> For instance, in *Stone v. Powell* the Court also directly weighed the general social costs of suppression of reliable evidence to hold that “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.”<sup>121</sup> Together, *Leon* and *Stone v. Powell* show that although the Court in *Calandra* had discussed the general social costs only in passing,<sup>122</sup> the consideration of these costs has been critical to establishing the scope of the exclusionary rule.

Also with regard to the social costs side of the balance, *Leon* and *Lopez-Mendoza* discuss these costs in grave language.<sup>123</sup> The Court’s concern with the

<sup>118</sup> See *supra* notes 93-94 and accompanying text.

<sup>119</sup> See *infra* Parts VI.A and VI.B.

<sup>120</sup> In addition to *Stone v. Powell*, discussed *infra* note 121 and accompanying text, see, e.g., *United States v. Janis*, 428 U.S. 433, 447 (1976) (“Clearly, the enforcement of admittedly valid laws would be hampered by so extending the exclusionary rule, and, as is nearly always the case with the rule, concededly relevant and reliable evidence would be rendered unavailable.”) and *Alderman v. United States*, 394 U.S. 165, 175-76 (1969) (“[W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.”).

<sup>121</sup> 428 U.S. 465, 494 (1976) (footnotes omitted). Justice Powell discussed the general social costs of suppression at great length, stating,

The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.

....

Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.

*Id.* at 489-90 (footnotes omitted).

<sup>122</sup> See *supra* note 81 and accompanying text.

<sup>123</sup> See *United States v. Leon*, 468 U.S. 897, 907 (1984) (“The *substantial social costs* exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern.” (emphasis added)); *id.* at 922 (referring to the “substantial costs of exclusion”); *id.* at 907 (referring to “objectionable collateral consequence[s]” of exclusion); *INS. v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984) (referring to “unusual and significant” social costs).

costs of suppression, in combination with the Court's above-noted willingness to reevaluate the balancing of costs and benefits as circumstances change,<sup>124</sup> suggests that the Court may lean toward finding the social costs high in comparison with deterrence benefits.

On the benefits side of the balance, *Leon* and *Lopez-Mendoza* establish two principles with regard to how the Court measures the deterrence value of applying the rule in given context. First, the Court examines the value only of any "additional deterrence"<sup>125</sup> or any "incremental deterrent effect"<sup>126</sup> that applying the exclusionary rule will have.<sup>127</sup> In *Leon*, the Court reaffirmed the proposition that the suppression of evidence from the prosecution's case in chief will deter law enforcement officers from committing unconstitutional searches and seizures.<sup>128</sup> Justice White then went to great lengths to discuss the various cases where the Court held that *extending* the exclusionary rule to a particular context would not provide sufficient *additional* deterrence to warrant application of the exclusionary rule in that context.<sup>129</sup> To extend the rule to a context outside the prosecution's case in chief, the Court requires a showing that an officer would be additionally deterred sufficiently to warrant suppression.<sup>130</sup>

The Court's method of valuing deterrence, however, "ignores . . . the incremental deterrent effect that application of the rule to all proceedings would have."<sup>131</sup> Justice Brennan took serious issue with this method of calculating the value of deterrence in his dissent in *Leon*.<sup>132</sup> He asserted that the incremental benefits of the exclusionary rule are found in the rule's "tendency to promote *institutional compliance* with Fourth Amendment requirements on the part of law enforcement agencies generally."<sup>133</sup> Such institutional deterrence<sup>134</sup> finds incremental value through its broad application, and institutional deterrence is weakened by failing to suppress evidence in other proceedings.<sup>135</sup> However sound it would be to maximize deterrence in this fashion, the majority in *Leon*

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<sup>124</sup> *Supra* notes 113-15 and accompanying text.

<sup>125</sup> *Lopez-Mendoza*, 468 U.S. at 1046 (emphasis added) (quoting *Janis*, 428 U.S. at 458).

<sup>126</sup> *Leon*, 468 U.S. at 909 (emphasis added) (quotations omitted) (citations omitted).

<sup>127</sup> *See also Janis*, 428 U.S. at 453 ("additional marginal deterrence").

<sup>128</sup> *See Leon*, 468 U.S. at 908.

<sup>129</sup> *Id.* at 908-13.

<sup>130</sup> *See Ashdown, supra* note 7, at 760 ("In all of these cases, the principal foundation for the position of the majority was that to the extent the exclusionary rule deters officers from violating the Fourth Amendment, the focus of the law enforcement mindset is on the introduction of evidence at the criminal trial and on appeal; tangential proceedings are not seriously considered by law enforcement officials in the deterrent equation.").

<sup>131</sup> *Id.*

<sup>132</sup> *See Leon*, 468 U.S. at 948-56 (Brennan, J., dissenting).

<sup>133</sup> *Id.* at 953 (emphasis added).

<sup>134</sup> *See id.* at 954 (referring to deterrence as an "institutionwide mechanism"); *id.* at 954 n.12 (referring to "systematic deterrence" (quoting Stewart, *supra* note 26, at 1400)).

<sup>135</sup> *See id.* at 953-54 (Brennan, J., dissenting).

makes clear that the Court will weigh the value of deterrence based on how much additional deterrence will accrue by suppressing evidence in a specific context.<sup>136</sup>

*Leon* and *Lopez-Mendoza* provide a second principle regarding the method of valuing the deterrence benefits in this balancing. The value of deterrence directly corresponds to the need for deterrence, and alternative remedies diminish the need for, and thus the value of, deterrence.<sup>137</sup> As the Court re-evaluates the scope of the exclusionary rule “in light of changing judicial understanding,”<sup>138</sup> the existence of truly adequate alternative remedies would decrease the need for the suppression of evidence as the primary means of ensuring that the protections of the Fourth Amendment are not an “empty promise.”<sup>139</sup> A corollary to this point is that as circumstances change, the value of deterrence in a particular context may decrease or increase.<sup>140</sup> Justice White stated that the exclusionary rule’s “continued application” is “substantial and deliberate,” but only “in the absence of a more efficacious sanction.”<sup>141</sup> Thus, both the social costs and the deterrence value of suppression will continue to be reevaluated by the Court.<sup>142</sup>

*Calandra*, *Leon*, and *Lopez-Mendoza* represent the framework the Supreme Court has used to weigh the social costs and deterrence benefits. Based on present day circumstances,<sup>143</sup> the Court weighs the costs by considering both the general social costs of suppression along with any specific social costs of the rule’s application in a given context.<sup>144</sup> The Court values deterrence value based on any additional deterrence provided by suppressing evidence in a given situation, discounting the benefit if alternative remedies exist to decrease the need for deterrence.<sup>145</sup>

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<sup>136</sup> See *supra* notes 125-29 and accompanying text.

<sup>137</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1045 (1984) (“[T]he deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights. The INS is a single agency, under central federal control, and engaged in operations of broad scope but highly repetitive character. The possibility of declaratory relief against the agency thus offers a means for challenging the validity of INS practices, when standing requirements for bringing such an action can be met.”).

<sup>138</sup> *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).

<sup>139</sup> *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

<sup>140</sup> See *supra* notes 114 and 115 and accompanying text. See also *Lopez-Mendoza*, 468 U.S. at 1050 (“Our conclusions concerning the exclusionary rule’s value *might change*, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.” (emphasis added)).

<sup>141</sup> *Leon*, 468 U.S. at 908-09 (quotations omitted) (citations omitted).

<sup>142</sup> See *supra* notes 112 and 114 and accompanying text.

<sup>143</sup> Stewart, *supra* note 26, at 1385 (“[E]xistence of adequate alternative remedies” must focus on “the present, not the past.”).

<sup>144</sup> See *supra* notes 120-24 and accompanying text.

<sup>145</sup> See *supra* notes 125-42 and accompanying text.

## III. THE KNOCK-AND-ANNOUNCE RULE

The knock-and-announce rule, "[t]he common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door,"<sup>146</sup> is derived from English common law.<sup>147</sup> It predates the year 1275,<sup>148</sup> and scholars<sup>149</sup> and judges<sup>150</sup> generally look to the 1603 decision in *Semayne's Case*<sup>151</sup> for the core principles behind the rule. The principles settled by *Semayne's Case*, relevant to the knock-and-announce rule, include the following:

(1) Every man's house is his castle, and defense of that house may extend even to death, and it is not a felony.

....

(3) Yet the liberty of the house does not hold against the King, and so for felony or suspicion of felony, or to do execution of the King's process, after signifying the cause of his coming and requesting the doors to be opened, a sheriff may break and enter, if admission is refused.<sup>152</sup>

In *Miller v. United States*,<sup>153</sup> the Supreme Court first recognized the knock-and-announce rule.<sup>154</sup> Many states had already enacted knock-and-

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<sup>146</sup> Hudson v. Michigan, 126 S. Ct. 2159, 2162 (2006).

<sup>147</sup> Wilson v. Arkansas, 514 U.S. 927 (1995) (stating that "the common law generally protected a man's house as [his castle]"); see also Kempker, *supra* note 6, at 790 (discussing knock-and-announce rule in context of *Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005) (establishing totality-of-the-circumstances test as standard for determining when exigent circumstances authorize warrant no-knock entry)).

<sup>148</sup> Wilson, 514 U.S. at 932 n.2. Specifically, Justice Thomas noted that

[The] "knock and announce" principle appears to predate even *Semayne's Case*, which is usually cited as the judicial source of the common-law standard. *Semayne's Case* itself indicates that the doctrine may be traced to a statute enacted in 1275, and that at that time the statute was but an affirmation of the common law.

*Id.* (quotation marks omitted).

<sup>149</sup> See, e.g., G. Robert Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 500 (1964) ("[*Semayne's Case*] has long been the leading decision interpreting the [knock-and-announce rule].").

<sup>150</sup> See, e.g., Wilson, 514 U.S. at 931-32 (looking to *Semayne's Case* in holding that knock-and-announce rule forms part of Fourth Amendment reasonableness inquiry).

<sup>151</sup> 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603).

<sup>152</sup> Blakey, *supra* note 149, at 500.

<sup>153</sup> 357 U.S. 301 (1958) (applying District of Columbia law).

<sup>154</sup> Kempker, *supra* note 6, at 791 ("The Supreme Court first addressed [the knock-and-announce rule] in *Miller v. United States*.").



announce statutes,<sup>155</sup> and the federal version, codified for the first time in 1917, resided in Section 3109 of Title 18.<sup>156</sup> However, it was only in 1995 that the Supreme Court held that the knock-and-announce rule was a factor in the reasonableness inquiry of the Search and Seizure Clause of the Fourth Amendment.

Although the Court recognized the knock-and-announce rule in *Miller*, it was not until almost four decades later that the Court incorporated the knock-and-announce rule into the Fourth Amendment in *Wilson v. Arkansas*.<sup>157</sup> Justice Thomas examined the common law and found “no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.”<sup>158</sup> The Court recognized two additional principles of the knock-and-announce rule. First, the knock-and-announce rule helped to avoid unnecessary property damage.<sup>159</sup> Second, the requirement would yield under circumstances where police officers were in danger of physical harm<sup>160</sup> or where evidence may be destroyed if they knock-and-announce.<sup>161</sup> These exceptions have generally been termed “exigent circumstances”<sup>162</sup> exceptions to the knock-and-announce rule.<sup>163</sup>

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<sup>155</sup> See *Miller*, 357 U.S. at 308-09 n.8 (collecting citations to state statutes enacting knock-and-announce provisions).

<sup>156</sup> 18 U.S.C. § 3109 (2000). Section 3109 reads:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

*Id.*

<sup>157</sup> See *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995).

<sup>158</sup> *Id.* at 931.

<sup>159</sup> *Id.* at 935-36 (citing *Semayne's Case*, 77 Eng. Rep. 194, 196 (K.B. 1603)).

<sup>160</sup> *Id.* at 936.

<sup>161</sup> *Id.* at 936; see also *Ker v. California*, 374 U.S. 23, 37 (1963) (plurality opinion) (holding that entry did not render arrest unlawful where officers “entered quietly and without announcement, in order to prevent the destruction of contraband”); *People v. Maddox*, 294 P.2d 6, 9 (Cal. 1956) (“Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with [the knock-and-announce rule].”). *Hudson v. Michigan* summarized the exigent circumstances rule, stating that the knock-and-announce rule “is not necessary when circumstances present a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile.” 126 S. Ct. 2159, 2612-63 (2006) (quotation marks omitted) (alterations omitted) (footnotes omitted).

<sup>162</sup> See *Ker*, 374 U.S. at 40.

<sup>163</sup> See, e.g., *Wilson*, 514 U.S. at 934 n.3 (referring to the phrase “exigent circumstances” from *Ker*); *Miller v. United States*, 357 U.S. 301, 309 (1958) (referring to “exigent circumstances” as “justification for noncompliance” with the knock-and-announce rule).

#### IV. THE CASE OF *HUDSON V. MICHIGAN*: THE INTERSECTION OF THE KNOCK-AND-ANNOUNCE RULE AND THE EXCLUSIONARY RULE

On August 27, 1998, seven police officers executed a search warrant for narcotics at Booker Hudson's home.<sup>164</sup> Although the officers had no "reason to believe that anyone in the home would attempt to destroy evidence, escape, or resist the execution of the warrant," when they arrived, they announced their presence and authority<sup>165</sup> and entered a few seconds later.<sup>166</sup> Upon entering, they seized from Hudson drugs and a loaded gun that was located in the chair in which he was sitting.<sup>167</sup> Michigan conceded that the officers violated the knock-and-announce rule, and the United States Supreme Court granted review to determine whether the evidence should have been suppressed.<sup>168</sup>

After starting by discussing the "now familiar"<sup>169</sup> *Calandra* balancing test, the majority opinion<sup>170</sup> articulated three reasons for why the exclusionary rule should not apply to violations of the knock-and-announce rule. First, a violation of the knock-and-announce rule is "*not* a but-for cause of obtaining the evidence"<sup>171</sup> (the "causation" rationale). Second, the interests protected by the knock-and-announce rule "would not be served by suppression of the evidence"<sup>172</sup> (the "interest" rationale). And third, while "the social costs of applying the exclusionary rule . . . are considerable[,] the incentive to [commit] such violations is minimal[,] . . . and the extant deterrents against them are substantial"<sup>173</sup> (the "cost-benefit" rationale).

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<sup>164</sup> Brief for Petitioner at 2, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360).

<sup>165</sup> *Id.*

<sup>166</sup> *Hudson*, 126 S. Ct. at 2162.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 2163.

<sup>169</sup> Ashdown, *supra* note 7, at 778.

<sup>170</sup> It is important to note that Justice Scalia's opinion for the Court was a majority opinion in respect to all parts setting forth the rationales discussed in this Note. *See infra* notes 171-73 and accompanying text. *Hudson v. Michigan* was decided by a 5-4 vote. 126 S. Ct. at 2159. Joining in Justice Scalia's majority opinion were Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* Justice Kennedy did not join in Part IV of Justice Scalia's opinion, which examined three previous Supreme Court cases that Justice Scalia discussed in support of the outcome. *Id.* at 2168-70. A dissenting opinion was filed by Justice Breyer, with Justices Stevens, Souter, and Ginsburg joining. *Id.* at 2171-86 (Breyer, J., dissenting).

<sup>171</sup> *Id.* at 2164 (majority opinion).

<sup>172</sup> *Hudson*, 126 S. Ct. at 2164.

<sup>173</sup> *Id.* at 2168.

### A. *The Attenuation Rationales*

Justice Scalia's assertion regarding the causation rationale is terse and undeveloped,<sup>174</sup> and serves primarily to introduce the interest rationale.<sup>175</sup> He states,

In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining evidence. Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house.<sup>176</sup>

The dissent disputes Justice Scalia's conclusion regarding causation, stating that "what [the] police *might* have done had they not behaved unlawfully" is "beside the point."<sup>177</sup> The Court must look at "what they *did* do," and whether there was "set in motion an independent chain of events that would have inevitably led to the discovery and seizure of the evidence despite, and independent of, that behavior."<sup>178</sup> Because the *possible* legal entry according to the valid search warrant never occurred, causation does not bar the suppression of the evidence.<sup>179</sup>

Justice Scalia's majority opinion goes into much greater depth to examine the interest rationale. Even if a constitutional violation is the but-for cause of discovery of evidence, the causation "can be too attenuated to justify exclusion."<sup>180</sup> Attenuation can happen "when the causal connection is remote" ("causal attenuation") or "when . . . the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained" ("interest attenuation").<sup>181</sup> Justice Scalia applies interest attenuation to further find that the evidence should not be suppressed.<sup>182</sup>

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<sup>174</sup> *Id.* at 2164. The dissenting opinion, in contrast, spends several pages examining the causation rationale. *See id.* at 2177-79 (Breyer, J., dissenting). For a good overview of the dissent, see *Fourth Amendment—Exclusionary Rule*, *supra* note 16, at 177-78.

<sup>175</sup> *See infra* notes 180-92 and accompanying text.

<sup>176</sup> *Hudson*, 126 S. Ct. at 2164.

<sup>177</sup> *Id.* at 2179 (Breyer, J., dissenting) (emphasis added).

<sup>178</sup> *Id.* (Breyer, J., dissenting) (emphasis added).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 2164 (majority opinion) (citing *United States v. Ceccolini*, 435 U.S. 268, 274-75 (1978)).

<sup>181</sup> *Id.* at 2164. Interest attenuation was established by the Court in *Ceccolini*, 435 U.S. at 279. where then-Justice Rehnquist held that

considerations relating to the exclusionary rule and the constitutional principles which it is designed to protect must play a factor in the attenuation analysis . . . . The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.

<sup>182</sup> *Hudson*, 126 S. Ct. at 2165.

Applying interest attenuation, Justice Scalia listed the interests protected by the Search and Seizure Clause as the right of "citizens [to] shield 'their persons, houses, papers, and effects,' from the government's scrutiny."<sup>183</sup> The interests protected by the knock-and-announce rule—"the protection of human life and limb,"<sup>184</sup> "the protection of property,"<sup>185</sup> and the protection of "those elements of privacy and dignity that can be destroyed by a sudden entrance"<sup>186</sup>—are not those protected by the Fourth Amendment. Because the interests protected by the knock-and-announce rule do not include "one's interest in preventing the government from seeing or taking evidence described in a warrant," Justice Scalia concludes that "the exclusionary rule is inapplicable."<sup>187</sup>

Justice Breyer takes serious issue with the interest attenuation portion of the majority opinion.<sup>188</sup> He rejects the concept of interest attenuation,<sup>189</sup> stating that it waters down the knock-and-announce rule's "constitutional values, purposes, and objectives."<sup>190</sup> Applying interest attenuation misses the point that because the *entry* was unlawful, the *search* was unlawful, and as such suppression is mandated.<sup>191</sup> In conclusion, he states that the interest attenuation rationale is not supported by precedent.<sup>192</sup>

#### B. *The Cost-Benefits Rationale*

The majority opinion could have concluded after either the discussion of the causation rationale or the discussion of the interest rationale.<sup>193</sup> However, Justice Scalia went on to find a third, independent and adequate<sup>194</sup> ground for

<sup>183</sup> *Id.* (quoting U.S. CONST. amend. IV).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* Specifically, on this point Justice Scalia quotes *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997), which states, "[t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." *Hudson*, 126 S. Ct. at 2165.

<sup>187</sup> *Hudson*, 126 S. Ct. at 2165.

<sup>188</sup> See also *Ashdown*, *supra* note 7, at 778 ("[Justice Scalia] . . . reached the *questionable conclusion* that the interests served by the rule . . . would not be served directly by the exclusion of the evidence obtained." (emphasis added)).

<sup>189</sup> *Hudson*, 126 S. Ct. at 2180 (Breyer, J., dissenting) ("[T]he majority gives the word 'attenuation' a new meaning . . .").

<sup>190</sup> *Id.* (Breyer, J., dissenting).

<sup>191</sup> *Id.* at 2181.

<sup>192</sup> *Id.*

<sup>193</sup> *Fourth Amendment—Exclusionary Rule*, *supra* note 16, at 178 ("The majority could have held more narrowly that there was no causal link between the violation and the discovery of evidence."); cf. *People v. Rodriguez*, 49 Cal. Rptr. 3d 811, 819 (Cal. Ct. App. 2006) (reading *Hudson's* discussion of adequate alternative remedies as dicta).

<sup>194</sup> See *Hudson*, 126 S. Ct. at 2165. Justice Scalia appears to consider his cost-benefit analysis of the application of the exclusionary rule to knock-and-announce violations as a separate grounds

holding the exclusionary rule to be inapplicable to violations of the knock-and-announce rule: the cost-benefit rationale.<sup>195</sup> “[T]he exclusionary rule has never been applied except ‘where its deterrence benefits outweigh its substantial social costs.’”<sup>196</sup>

In weighing the costs of suppression, Justice Scalia included general social costs, “exclusion of relevant incriminating evidence” resulting in “releasing dangerous criminals into society,”<sup>197</sup> as well as costs specific to the knock-and-announce context: overwhelming litigation over alleged violations,<sup>198</sup> increased danger to law enforcement officers,<sup>199</sup> and greater “destruction of evidence.”<sup>200</sup> These costs were found to be “considerable.”<sup>201</sup>

Against these social costs, Justice Scalia weighed the deterrence benefits. First, he considered the need for deterrence. The only result of failing to knock-and-announce is “the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even ‘reasonable suspicion’ of their existence, *suspend the knock-and-announce requirement anyway*.”<sup>202</sup> In other words, if officers have reasonable suspicion of these dangers, they may forgo knocking and announcing; thus, the incentive to violate the rule is minimal, so the need for deterrence is correspondingly decreased.<sup>203</sup>

Justice Scalia then considered the need for deterrence based on potential alternative remedies that exist in the present day: “We cannot assume that ex-

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for suppressing the evidence in the case, beginning this portion of the opinion by stating, “[q]uite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs.” *Id.* (quotation marks omitted) (emphasis added).

<sup>195</sup> *See id.*

<sup>196</sup> *Id.* (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (quotation marks omitted)).

<sup>197</sup> *Hudson*, 126 S. Ct. at 2165.

<sup>198</sup> *Id.* at 2166. Specifically, Justice Scalia states that it would generate a “flood of alleged failures to observe the rule, and claims that any asserted . . . justification for a no-knock entry had inadequate support.” *Id.* (citations omitted). The litigation in knock-and-announce violations, requiring an examination of nebulous standards, including “reasonable wait time,” *id.* (quoting *United States v. Banks*, 540 U.S. 31, 41 (2003)), and “reasonable suspicion,” would be more expensive than examining whether “there was or was not a warrant” or whether “the *Miranda* warning was given, or not.” *Id.*

<sup>199</sup> *Id.* This cost is premised on the proposition that excluding evidence where a violation in the knock-and-announce rule occurred would result in “police officers’ refraining from timely entry after knocking and announcing . . . [because] the amount of time they must wait is necessarily uncertain.” *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 2165.

<sup>202</sup> *Id.* at 2166.

<sup>203</sup> *Id.*

clusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago."<sup>204</sup>

First, Justice Scalia remarked that increased availability of civil suits and "attorney's fees for civil-rights plaintiffs"<sup>205</sup> provide alternative remedies for search and seizure violations, resulting in diminished need for deterrence through suppression. Justice Scalia referred to several landmark civil rights cases and statutes that were not enacted or decided until after the decision in *Mapp*.<sup>206</sup> He emphasized that at the time of *Mapp* a plaintiff could not seek damages from municipalities,<sup>207</sup> and it was not until several years after *Mapp* that a plaintiff could recover attorney's fees in such a suit.<sup>208</sup> "As far as we know, civil liability is an effective deterrent here . . . ."<sup>209</sup> The availability of effective deterrence through civil suits diminishes the need for deterrence through suppression.<sup>210</sup>

In addition to increased ability to bring civil suits, Justice Scalia pointed to "the increasing professionalism of police forces, including a new emphasis on internal police discipline" as a factor diminishing the need for deterrence through suppression.<sup>211</sup> Law enforcement officers of the twenty-first century are taught to "respect constitutional guarantees,"<sup>212</sup> and failure to provide such training "exposes municipalities to financial liability."<sup>213</sup> He also pointed to mechanisms providing for "citizen review" as providing additional deterrence.<sup>214</sup> In sum, the changing face of the police force has resulted in a diminished need for deterrence through the external sanction of suppression.

Justice Scalia concludes the balancing of costs and benefits, stating, "the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with,

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<sup>204</sup> *Id.* at 2167. Justice Scalia's examination of remedies as they exist at the time of the decision is consistent with then-retired Justice Stewart's statement that "[i]n considering whether the exclusionary rule is constitutionally required, the inquiry into the existence of adequate alternative remedies must examine the present, not the past." Stewart, *supra* note 26, at 1385; *see also supra* note 104 (referring to Justice O'Connor's willingness to revisit the conclusion in *Lopez-Mendoza* if needed).

<sup>205</sup> *Hudson*, 126 S. Ct. at 2166-68.

<sup>206</sup> *Id.* at 2167-68.

<sup>207</sup> *Id.* at 2167 (citing *Monroe v. Pape*, 365 U.S. 167 (1961) (establishing municipal liability under 18 U.S.C. § 1983)).

<sup>208</sup> *Id.* (citing 42 U.S.C. § 1988).

<sup>209</sup> *Id.* at 2167-68.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 2168.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* (citing *Canton v. Harris*, 489 U.S. 378, 388 (1989) ("We hold today that the inadequacy of police training may serve as the basis for § 1983 liability . . . where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.")).

<sup>214</sup> *Hudson*, 126 S. Ct. at 2168.

and the extant deterrences against them are substantial . . . . Resort to the massive remedy of suppressing evidence of guilt is unjustified.”<sup>215</sup>

Justice Breyer rejects the application of the *Calandra* balancing test, preferring to categorize previous exceptions to the exclusionary rule into two discrete categories.<sup>216</sup> The first category of exceptions includes those opinions in which the Court has refused to suppress evidence outside of the context of criminal trial proceedings,<sup>217</sup> like in grand jury proceedings.<sup>218</sup> This category does not apply because *Hudson* involves an ordinary criminal trial.<sup>219</sup>

The second category of exclusionary rule exceptions under Justice Breyer’s approach includes contexts where the exclusionary rule would result in no “appreciable deterrence,”<sup>220</sup> like the good-faith exception.<sup>221</sup> These exceptions turn only on whether or not suppression in a given context would lack deterrence.<sup>222</sup> Justice Breyer finds that deterrence can be expected by suppressing evidence seized in violation of the knock-and-announce rule.<sup>223</sup> He rejects any balancing of the “substantial social costs” of suppression against the deterrence benefits, stating that it is “an argument that [the] Court . . . has consistently rejected.”<sup>224</sup> The implication is that if the Court actually weighed the social costs into its exclusionary rule balancing, the costs would always outweigh the benefits, and the exclusionary rule would cease to exist. Justice Breyer, thus, would have the Court examine only the deterrence benefits prong of the *Calandra* balancing test, and in this case, he would find the deterrence benefits to exist, thereby supporting application of the rule.<sup>225</sup>

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 2177 (Breyer, J., dissenting).

<sup>217</sup> *Id.* at 2175.

<sup>218</sup> *See* *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>219</sup> *Hudson*, 126 S. Ct. at 2176 (Breyer, J., dissenting).

<sup>220</sup> *Id.* at 2175 (Breyer, J., dissenting) (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)).

<sup>221</sup> *United States v. Leon*, 468 U.S. 897 (1984).

<sup>222</sup> *Hudson*, 126 S. Ct. at 2176 (Breyer, J., dissenting) (characterizing the lack of deterrence as the “critical . . . rationale”).

<sup>223</sup> *Id.* (“[T]here is no reason to think that, in the case of knock-and-announce violations by the police, the exclusion of evidence at trial would not sufficiently deter future errors . . . .” (quotation marks omitted) (citations omitted)).

<sup>224</sup> *Id.* at 2177.

<sup>225</sup> *See id.* at 2175-77. It should be noted that Justice Kennedy’s concurrence provides some mixed relief to supporters of the exclusionary rule. *Fourth Amendment—Exclusionary Rule*, *supra* note 16, at 183 n.81 (“Justice Kennedy’s concurrence cast some doubt on whether the Court, at least as it is currently constituted, has five votes to eliminate the exclusionary rule.”). Although he joined in all parts of Justice Scalia’s opinion discussed herein, *see supra* note 170, Justice Kennedy stated that “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt,” *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring). While some read this portion of his concurrence to indicate that the votes might not exist to overrule the exclusionary rule, *see supra*, others question this conclusion, given that Justice Kennedy

## V. HUDSON'S IMPACT ON THE KNOCK-AND-ANNOUNCE RULE

The knock-and-announce rule is, at least in name, a constitutional rule,<sup>226</sup> but *Hudson* makes clear that suppression of evidence is not the appropriate remedy for a violation of the knock-and-announce protections.<sup>227</sup> Various courts have dealt with knock-and-announce cases since *Hudson* was decided, and these decisions indicate that *Hudson* may have greatly diminished the constitutional protections of the rule.<sup>228</sup>

Several courts have extended *Hudson* to other knock-and-announce contexts.<sup>229</sup> In *United States v. Southerland*, the United States Court of Appeals for the District of Columbia Circuit held that where an officer executes a warrant in violation of the federal knock-and-announce statute, evidence seized need not be suppressed.<sup>230</sup> The court reasoned that the extension of *Hudson* to the federal statute was warranted because the federal statute simply embodied the common-law knock-and-announce doctrine.<sup>231</sup>

The First Circuit Court of Appeals extended *Hudson* to the execution of arrest warrants in *United States v. Pelletier*.<sup>232</sup> The Fourth Amendment does not require suppression where law enforcement officers violate the knock-and-announce rule "in the course of executing an arrest warrant."<sup>233</sup> The panel rea-

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joined the majority opinion in all aspects discussed above, see Moran, *supra* note 6, at 307-08 (noting that Justice Kennedy "joined the very parts of Justice Scalia's opinion that cast doubt on the exclusionary rule"); LAFAVE, *supra* note 16 ("[Justice Kennedy's concurring opinion] provides little solace when it is considered how many other types of Fourth Amendment violations could easily be encompassed within a comparably slipshod deterrence/costs balancing.").

<sup>226</sup> See *supra* notes 157-58 and accompanying text.

<sup>227</sup> *Hudson*, 126 S. Ct. at 2165.

<sup>228</sup> David Moran, who represented Booker Hudson in *Hudson v. Michigan*, Moran, *supra* note 6, at 283, asserts that the knock-and-announce rule is not only diminished in strength, but has been put to rest. *Id.* at 304-05. He states that, "[b]efore turning to the broader implications of the *Hudson* decision, I think it worthwhile to briefly eulogize the knock-and-announce rule. A eulogy is appropriate because I do not believe anyone can seriously deny that the knock-and-announce rule is now dead in the United States." *Id.*; see also Chemerinsky, *supra* note 8, at 20 ("There is still a right to have the police refrain from entering without knocking and announcing, but the absence of any realistic remedy for violations is sure to make the rule a practical nullity.").

<sup>229</sup> *United States v. Acosta*, 502 F.3d 54 (2d Cir. 2007) (extending *Hudson* to violations of 18 U.S.C. § 3109 (codifying the common-law knock-and-announce doctrine)); *United States v. Bruno*, 487 F.3d 304 (5th Cir. 2007) (same); *United States v. Southerland*, 466 F.3d 1083 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 1361 (2007) (same); *United States v. Pelletier*, 469 F.3d 194, 196 (1st Cir. 2006) (extending *Hudson* to "knock and announce violation[s] committed in the course of executing an arrest warrant"); *United States v. Smith*, 457 F. Supp. 2d 802, 804-06 (E.D. Mich. 2006) (extending *Hudson* to knock-and-announce violation occurring during *warrantless* search of "inmate with community status . . . held by an electronic tether" on grounds that inmate had no reasonable expectation of privacy).

<sup>230</sup> *Supra* note 229.

<sup>231</sup> *Southerland*, 466 F.3d at 1084.

<sup>232</sup> *Pelletier*, 469 F.3d at 196.

<sup>233</sup> *Id.*



soned that as a search warrant grants law enforcement officers the authority to enter the location to be searched to execute the warrant, an arrest warrant grants law enforcement officers the authority to enter the defendant's residence<sup>234</sup> "so long as there is reason to believe that the [defendant] is inside."<sup>235</sup> *Southerland* and *Pelletier* seem to be elementary and non-problematic extensions of *Hudson*, insofar as one accepts the reasoning of *Hudson*.<sup>236</sup>

More disturbing than the above extensions of *Hudson*, however, are the next set of knock-and-announce cases, which tend to support Justice Breyer's statement that *Hudson* "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection."<sup>237</sup> Initially, in the wake of *Hudson*, three Courts of Appeals presented with knock-and-announce violations held that no violation had occurred, and as such they had no reason to apply *Hudson*.<sup>238</sup> In contrast to those early cases, however, four Courts of Appeals confronted with knock-and-announce violations have noted that *Hudson* does not require suppression for violations of the knock-and-announce rule, thereby disposing of the Fourth Amendment claims without further examination.<sup>239</sup>

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<sup>234</sup> *Id.* at 199-201.

<sup>235</sup> *Id.* at 199.

<sup>236</sup> *Id.* at 196 ("[T]he *Hudson* Court's reasoning mandates such an extension.").

<sup>237</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2171 (2006) (Breyer, J., dissenting); see also Daniel A. Gutin, Note, *Technical Knockout: Hudson v. Michigan and the Unfortunate Demise of the Knock-And-Announce Rule*, 44 AM. CRIM. L. REV. 1239 (2007); David Carn, Casenote, *Hey Officer, Didn't Someone Teach You to Knock? The Supreme Court Says No Exclusion of Evidence for Knock-And-Announce Violations in Hudson v. Michigan*, 58 MERCER L. REV. 779 (2007); J. Spencer Clark, Comment, *Hudson v. Michigan: "Knock-and-Announce"—An Outdated Rule?*, 21 BYU J. PUB. L. 433 (2007); Monica Ball Jackson, Note, *The Demise of the Knock-And-Announce Rule*, 11 T.G. JONES L. REV. 55 (2006); *Criminal Procedure Survey*, 55 U. KAN. L. REV. 797, 809-11 (2007) ("[A] substantial deterrent to performing no-knock entries has been washed away . . ."); Brian S. Uholik, Comment, *Who Cares If It's Open?: Hudson v. Michigan and the United States Supreme Court's Evisceration of the Knock and Announce Rule*, 112 PENN. ST. L. REV. 261 (2007); Rachel Rediker, *Constitutional Law – The "Knock and Announce" Rule Becomes Obsolete – Hudson v. Michigan*, 126 S. Ct. 2159 (2006), 12 SUFFOLK J. TRIAL & APP. ADVOC. 203 (2006).

<sup>238</sup> See *United States v. Brathwaite*, 458 F.3d 376, 379 n.2 (5th Cir. 2006) (holding that no knock-and-announce violation occurred, and not arriving to the question of suppression under *Hudson*); *United States v. Gaver*, 452 F.3d 1007, 1008 (8th Cir. 2006) (refusing to determine whether knock-and-announce violation occurred because suppression is not appropriate under *Hudson*); *United States v. Esser*, 451 F.3d 1109, 1113 & n.3 (10th Cir. 2006) (referring to *Hudson* but holding that no knock-and-announce violation occurred, and thus finding no need to apply *Hudson*); see also *United States v. Sublet*, slip op. 05-20912, 2006 WL 3825662, at \*1 (5th Cir. Dec. 27, 2006) (citing *Hudson* but holding knock-and-announce rule not violated on plain error review).

<sup>239</sup> See *United States v. Mendizabal*, slip op. 05-6887, 2006 WL 3741185 (6th Cir. Dec. 20, 2006) (applying *Hudson* to knock-and-announce violation); *United States v. Snow*, 462 F.3d 55, 61 & n.4 (2d Cir. 2006) (applying *Hudson* to knock-and-announce violation, citing interest attenuation and "marginal societal benefit"); *United States v. Ramirez*, 196 F. App'x 538, 539 (9th Cir. 2006) (applying *Hudson* to claim of knock-and-announce violation); *United States v. Brown*,

These cases underscore a collateral effect of *Hudson*: courts no longer need to examine the myriad issues that accompany officers' execution of search warrants where they fail to knock-and-announce, at least not in criminal suppression hearings.<sup>240</sup> By avoiding the constitutional issue of whether law enforcement officers violated the knock-and-announce rule, these courts avoid unnecessary adjudication of constitutional questions. However, the exact dimensions of the knock-and-announce protections will remain undecided as a result, unless resolved in civil actions<sup>241</sup> or pursuant to state constitutional protections.<sup>242</sup> Unless and until such avenues fill the void, law enforcement officers will have little guidance on how to respect this crucial Fourth Amendment protection.<sup>243</sup>

These collateral effects of *Hudson* support Justice Breyer's concern that *Hudson* effectively writes the knock-and-announce rule out of the Fourth Amendment.<sup>244</sup> The treatment that lower courts have given the knock-and-

189 F. App'x 722, 724 (10th Cir. 2006) (refusing to determine whether exigent circumstances justified no-knock warrant and simply ruling that suppression was not appropriate).

<sup>240</sup> See *Hudson*, 126 S. Ct. at 2162-63 (discussing the difficulty of applying the knock-and-announce rule and stating, "[h]appily, these issues do not confront us here"); *State v. Savage*, 906 A.2d 1054, 1057 (Md. Ct. Spec. App. 2006) ("This case had promise of leading us to a hidden treasure trove of intriguing nuances about the phenomenon (or phenomena) of knocking and announcing, had not that inquiry been unceremoniously short-circuited by *Hudson v. Michigan*." (citations omitted)).

<sup>241</sup> See *Hudson*, 126 S. Ct. at 2167-68 (discussing civil suits for violations of the knock-and-announce rule).

<sup>242</sup> See *supra* note 240 and accompanying text; cf. *State v. Babcock*, 718 N.W.2d 624, 630 n.\* (S.D. 2006) (holding that failure to knock-and-announce was warranted, thereby obviating need to determine application of *Hudson* under state constitution); *State v. Harrell*, 2006 WL 3290432, at \*4-5 n.1 (Minn. Ct. App. Nov. 14, 2006) (same). For an example of a state court, post-*Hudson*, choosing to define the knock-and-announce protections to include suppression, see *State v. Vargas*, 149 P.3d 961 (N.M. Ct. App. 2006) (reversing denial of suppression motion on state constitutional grounds where exigent circumstances did not justify failure to comply with knock-and-announce requirements).

<sup>243</sup> Cf. Kamisar, *supra* note 25, at 123-26 (discussing the reaction of law enforcement to the decision of *Mapp v. Ohio* and concluding that law enforcement is "unfamiliar with and uninterested in the law of search and seizure" when courts do not suppress evidence); see also Reginald Fields, *Police Benefit from Ruling, Court Told Search Need Not Be Perfect*, PLAIN DEALER, Feb. 15, 2007, at B1 (relating positive police reactions to Ohio Supreme Court's application of *Hudson* in drug cases).

<sup>244</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2182 (2006) (Breyer, J., dissenting). *Wilson v. Arkansas* held the knock-and-announce rule part of the Fourth Amendment. See *supra* notes 157-58 and accompanying text. According to Justice Breyer, the majority opinion essentially eliminates the knock-and-announce rule as a constitutional protection, but rather than doing so by reexamining *Wilson*, the majority does so under the auspices of a discussion of suppression. *Hudson*, 126 S. Ct. at 2182 (Breyer, J., dissenting) ("To argue that police efforts to assure compliance with the rule may prove dangerous, however, is not to argue against evidence suppression. It is to argue against the validity of the [knock-and-announce] rule itself."); *id.* at 2182-83 ("[I]f the Court fears that effective enforcement of a constitutional requirement will have harmful consequences, it should face those fears directly by addressing the requirement itself. It should not argue, 'the requirement is fine, indeed, a serious matter, just don't enforce it.'").

announce rule after *Hudson* at least shows that the rule's exact dimensions will remain unknown for the time being.<sup>245</sup>

## VI. HUDSON'S IMPACT ON THE EXCLUSIONARY RULE

[T]oday's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases.<sup>246</sup>

It now appears that the Court's victory over the Fourth Amendment is complete.<sup>247</sup>

The above quotes were not directed at *Hudson*; they are criticisms of the 1974 decision of *United States v. Calandra* and the 1984 decision of *United States v. Leon*, respectively. These quotes do, however, mirror many of the criticisms leveled at *Hudson*.<sup>248</sup>

Contrary to the criticisms of *Hudson*'s detractors, *Hudson*'s application of the *Calandra* balancing test does not mark a drastic change in exclusionary rule jurisprudence.<sup>249</sup> *Hudson* does, however, bring the debate to the present. As courts have relied on *Hudson*, they have shown discomfort with the proposition that adequate alternative remedies exist to diminish the need for the exclusionary rule. Despite this discomfort, courts are relying on *Hudson* to create a presumption against suppression and to decrease the scope of the exclusionary rule in reliance on *Hudson*.

### A. *Hudson Brings the Exclusionary Rule Debate to the Present*

*Hudson*'s profound effect is not the weighing of costs and benefits,<sup>250</sup> but the reopening of the debate about the existence of alternative remedies and the effect that such remedies have on the need for deterrence through suppression. *Hudson* focuses the debate in the existence of alternative remedies in the present day.

<sup>245</sup> Cf. *Hudson*, 126 S. Ct. at 2182 (Breyer, J., dissenting) ("The very process of arguing the merits of the violation would help to clarify the contours of the knock-and-announce rule, contours that the majority believes are too fuzzy.").

<sup>246</sup> *United States v. Calandra*, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting).

<sup>247</sup> *United States v. Leon*, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting).

<sup>248</sup> See *supra* notes 5-8 and accompanying text.

<sup>249</sup> But see Blair, *supra* note 14, at 756-57 (asserting that *Hudson* "abandon[s] the deterrence rationale that has been applied for over forty years" by the Supreme Court).

<sup>250</sup> The Supreme Court has applied the *Calandra* balancing test consistently to determine the scope of the exclusionary rule for over three decades. See *supra* Part II.C.

In applying *Calandra*, Justice Scalia discounts the need for deterrence based on present day civil remedies and the current state of professionalism and training in law enforcement.<sup>251</sup> In asserting that remedies exist today to decrease the need for deterrence, Justice Scalia logically places his discussion of alternative remedies in the present.<sup>252</sup>

Justice Breyer asserts that the Court should not balance costs and benefits; instead, the Court should determine only whether the rule's application would lack any deterrence value.<sup>253</sup> He rejects the weighing of general social costs, because if the court weighs the general social harm of suppression against any additional deterrence benefits, the costs will always win, trumping the exclusionary rule.<sup>254</sup>

Justice Breyer's repudiation of the balancing goes against the weight of *Calandra*, *Leon*, and *Lopez-Mendoza*, among others, where the Court has consistently weighed the injury incurred by the rule's application against the benefits of suppression.<sup>255</sup> The scope of the exclusionary rule "must be resolved by weighing the costs and benefits."<sup>256</sup> When weighing the costs, the Supreme Court has regularly concerned itself with the general social costs of the exclusionary rule.<sup>257</sup>

*Hudson* makes clear that when examining the exclusionary rule courts should not only examine the costs incurred in a specific context,<sup>258</sup> but also the general harm to society and the truth-finding function of the legal system. Such balancing of interests is not a concept foreign to the Court,<sup>259</sup> but examining the benefits of a rule without considering its costs seems to stop short of a complete analysis of the issue. *Hudson*'s focus on balancing social costs does not mark a

<sup>251</sup> See *supra* notes 195-214 and accompanying text.

<sup>252</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2167 (2006) ("We cannot assume that exclusion in [one] context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago."). Judge Moylan, in discussing *Hudson*'s present-day reevaluation of adequate alternative remedies, stated, "There . . . follow in the opinion [the] unmistakable subterranean rumblings of possible future import in the discussion of viable alternatives to the exclusionary rule." *State v. Savage*, 906 A.2d 1054, 1086 (Md. Ct. Spec. App. 2006).

<sup>253</sup> *Hudson*, 126 S. Ct. at 2176 (Breyer, J., dissenting).

<sup>254</sup> *Id.* at 2177 ("The majority's 'substantial social costs' argument is an argument against the Fourth Amendment's exclusionary principle itself.").

<sup>255</sup> See *supra* Part II.C.

<sup>256</sup> *United States v. Leon*, 468 U.S. 897, 906-07 (1984) (emphasis added).

<sup>257</sup> *Id.* at 907 (stating that the costs that the exclusionary rule inflicts "have long been a source of concern"); *Stone v. Powell*, 428 U.S. 465, 495 (1976) ("[T]he substantial societal costs of application of the rule persist with special force").

<sup>258</sup> *Hudson*, 126 S. Ct. at 2177 (Breyer, J., dissenting) (referring to the "special" costs incurred by application of the exclusionary rule in a given context).

<sup>259</sup> See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (requiring a balancing of public and private interests to determine the scope of due process protections).

major shift in the Court's precedent, and on its face it would not appear to have long-term effects on the exclusionary rule, unless the Court finds alternative remedies to be adequate.

Justice Breyer denies the effectiveness of the majority's purported alternative remedies, rejects examination of the social costs, and proposes that the Court not reopen the difficult social questions decided in *Mapp*.<sup>260</sup> However, Justice Stewart stated over two decades ago that the examination of adequate alternative remedies must occur with a focus on the "present, not the past."<sup>261</sup> Furthermore, Justice O'Connor's discussion of alternative remedies in *Lopez-Mendoza* explicitly acknowledged that the Court should revisit the adequacy of those remedies in the future as needed.<sup>262</sup>

This discussion will not resolve the debate of whether the remedies that exist today are adequate—while civil rights actions have expanded greatly since *Mapp*,<sup>263</sup> limits on the same actions have expanded as well<sup>264</sup>—but the dissent's position that the Court should not reexamine the costs and benefits based on present day conditions fails to recognize that "[t]he world has changed in the [forty-six] years since the *Mapp* decision was announced."<sup>265</sup>

The questions that the Court struggled with in *Wolf* and *Mapp* were questions that judges had been struggling with for decades.<sup>266</sup> Given the great minds that have struggled over this question on the bench, not to mention those scholars who have struggled with it through the countless pages of law review articles,<sup>267</sup> it is critical that the Supreme Court continue to examine closely its exclusionary rule decisions.

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<sup>260</sup> *Hudson*, 126 S. Ct. at 2173-75 (Breyer, J., dissenting).

<sup>261</sup> Stewart, *supra* note 26, at 1385.

<sup>262</sup> See *supra* notes 128-29, 136 and accompanying text.

<sup>263</sup> *Hudson*, 126 S. Ct. at 2167 (majority opinion) (citing *Monroe v. Pape*, 365 U.S. 167 (1961) (expanding color of law doctrine)); *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (providing for municipality liability under Section 1983); and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (allowing implied private cause of action under the Fourth Amendment against federal officers)).

<sup>264</sup> See *Alden v. Maine*, 527 U.S. 706 (1999) (extending state sovereign immunity to suits in state court); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding federal executive officials entitled to qualified immunity); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding *Ex parte Young* suit not permitted where Congress has enacted intricate procedures to define and limit remedies under federal statute); *id.* (holding Congress cannot abrogate state sovereign immunity under Commerce Clause); see also *Hans v. Louisiana*, 134 U.S. 1 (1890) (extending state sovereign immunity to federal question jurisdiction).

<sup>265</sup> Stewart, *supra* note 26, at 1386; cf. *State v. Savage*, 906 A.2d 1054, 1088 (Md. Ct. Spec. App. 2006) ("There is an implication that the exclusionary rule may be caught in a time warp half a century old.").

<sup>266</sup> *People v. Cahan*, 282 P.2d 905 (Cal. 1955) (Traynor, J.) (adopting the exclusionary rule); *People v. Defore*, 150 N.E. 585 (N.Y. 1926) (Cardozo, J.) (rejecting the exclusionary rule). These two seminal, and conflicting, decisions were cited in *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>267</sup> Kamisar, *supra* note 25, at 119 n.1 (containing a short bibliography of some seminal works on the exclusionary rule from various sides of the debate).

The Supreme Court's exclusionary rule decisions are not sacrosanct; as the Court's understanding of the costs and benefits of suppression change, and as alternative remedies develop or are shown to be inadequate, the exclusionary rule's scope changes.<sup>268</sup> *Hudson* recognizes that the exclusionary rule requires this delicate balance, tempered by changing judicial understanding, and in this regard *Hudson* is neither ground-breaking nor does it break with precedent, even though one may disagree with the result of the balance.<sup>269</sup>

As such, *Hudson* does not "pose[] a greater threat to the exclusionary rule than the past decisions that limited its application."<sup>270</sup> *Hudson* continues to apply the *Calandra* balancing test in a logical fashion.<sup>271</sup> If the exclusionary

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<sup>268</sup> See, e.g., *Hudson*, 126 S. Ct. at 2171 (Kennedy, J., concurring) ("Today's decision does not address any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern."); *id.* at 2167 (majority opinion) ("We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago.").

Justice Blackmun recognized the "provisional" nature of exclusionary rule decisions, stating, "What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less." *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

<sup>269</sup> See *supra* notes 105-15 and accompanying text.

<sup>270</sup> See *Fourth Amendment—Exclusionary Rule*, *supra* note 16, at 182-83.

<sup>271</sup> There is another aspect of the Supreme Court's exclusionary rule jurisprudence that is worth examining to determine if, in light of *Hudson*, the exclusionary rule is truly in danger, and that is the concept of "incremental deterrence benefits." *Leon*, 468 U.S. at 909. Based on the following logic, the principle of incremental deterrence value militates against the complete removal of the exclusionary rule any time soon. First, the Supreme Court has held that when weighing the deterrence value of the exclusionary rule in a specific context, the value is measured by the incremental value of deterrence: based on how much deterrence exists because of the rule's existing application, how much more deterrence is added by its application in the context at hand? For example, consider *Stone v. Powell*, 428 U.S. 465 (1976), which held that the exclusionary rule did not apply to grand jury hearings. Given the existing deterrence value of the exclusionary rule at the time, how much more deterrence would be added by further exclusion of evidence from grand jury proceedings? That difference is the incremental deterrence value of the exclusionary rule, and the *Calandra* balancing test considers only this incremental deterrence benefit when determining whether to apply the exclusionary rule in the context at hand. *United States v. Calandra*, 414 U.S. 338 (1974). Thus, the Court has relied on incremental deterrence value to hold that the exclusionary rule should not apply in a variety of contexts or proceedings over the last thirty years. However, were the Court to reverse *Mapp*, the incremental deterrence value of applying the exclusionary rule would increase exponentially in many of the post-*Mapp* cases. Therefore, somewhat paradoxically, by reversing *Mapp*, the Court would in essence be forcing reevaluation of the value of deterrence in other contexts. Thus, something would have to displace the deterrence value of

rule is in danger—or in other words, if supporters of the exclusionary rule feel that it is vulnerable after *Hudson*—any danger results from the Court's jurisprudence over the last thirty-plus years,<sup>272</sup> not because of the 2006 decision of *Hudson*. *Hudson's* evaluation of the present-day costs and benefits of the exclusionary rule is a logical and necessary application of three decades of Supreme Court decisions, and without considering these factors in light of the present day, commentators and scholars remain in the proverbial dark ages.

*B. Courts Are Uncomfortable With the Adequacy of Alternative Remedies*

Although *Hudson's* major impact is the reopening of the debate about the necessity of the exclusionary rule in light of adequate alternative remedies, courts are reluctant to agree that *Hudson's* purported remedies—civil suits and the professionalism of police forces—are adequate.

Courts have often referred to *Hudson's* application of the *Calandra* balancing test, and they have cited *Hudson* with particular fervor regarding the social costs of suppression.<sup>273</sup> Courts have even relied on *Hudson's* discussion of social costs to narrow the exclusionary rule, or suggest its further narrowing.<sup>274</sup> However, neither the *Calandra* balancing test nor the examination of social costs are major shifts in the Court's exclusionary rule jurisprudence.<sup>275</sup> On the other hand, courts have not delved into *Hudson's* proposition that alternative remedies have decreased the need for the exclusionary rule, and in the one federal case referring to this proposition, the court rejected the effectiveness of these remedies.<sup>276</sup> This disparity in treatment suggests that while courts are comfortable discussing and considering the social costs of suppression, they may disagree with the effectiveness of *Hudson's* purported remedies.<sup>277</sup>

*United States v. Mosley* is the only federal case to examine *Hudson's* proposed alternative remedies, and *Mosley* essentially rejects the proposition that civil suits and police professionalism decrease the need for the exclusionary rule.<sup>278</sup> *Mosley* may be the first judicial response in the reopened debate over the necessity of the exclusionary rule in light of alternative remedies.

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the exclusionary rule, most likely adequate alternative remedies through civil actions, before the Court could overrule *Mapp*.

<sup>272</sup> Cf. Ashdown, *supra* note 7, at 755.

<sup>273</sup> See *infra* Parts VI.C and VI.D.

<sup>274</sup> See *infra* Part VI.D.

<sup>275</sup> See *supra* Part VI.A.

<sup>276</sup> See *infra* notes 325-26 and accompanying text.

<sup>277</sup> See also Blair, *supra* note 14, at 758-60 (challenging the increased professionalism of police forces as an adequate alternative remedy).

<sup>278</sup> 454 F.3d 249 (3d Cir. 2006). But see *State v. Hastings*, 959 So. 2d 1000 (La. Ct. App. 2007) (refusing to suppress evidence seized in violation of state law in part because adequate alternative remedies exist).

Robert Mosley was a passenger in Julian Hayes's vehicle when the police stopped the car on the basis of an anonymous tip.<sup>279</sup> Officers found weapons in the car and arrested both Mosley and Hayes for gun possession.<sup>280</sup> Because the officers did not observe Hayes violate any traffic laws and because they based the stop solely on an anonymous tip, the government conceded that the stop, and therefore the seizure, was unlawful.<sup>281</sup> The government dropped the charges against the driver, Hayes, but argued that Mosley had no standing to suppress the guns as a passenger in the vehicle.<sup>282</sup> The District Court agreed and denied the motion to suppress, and Mosley was convicted.<sup>283</sup>

Mosley's appeal presented the Court of Appeals for the Third Circuit with a matter of first impression: can a passenger without possessory interest in a vehicle suppress evidence seized pursuant to an unlawful stop of the vehicle?<sup>284</sup> Judge Fisher examined whether the evidence was the fruit of the unlawful seizure; specifically he examined whether, just as a short-term guest cannot contest the unlawful search of a home, a passenger cannot move to suppress evidence seized pursuant to the unlawful seizure of a vehicle.<sup>285</sup> He held, after a thorough analysis, that the evidence was the fruit of the unlawful seizure, but before determining that suppression was appropriate, he noted that under *Hudson* a court should consider the balancing of costs and benefits:

The test by which our models of constitutional causation are measured is not empirical validation by experiment, but rather the march of social progress, refracted through continual judicial evaluation of constitutional purposes and social consequences.<sup>286</sup>

In applying this balancing test, Judge Fisher stated that the court must consider:

the nature of the personal and social interests the Constitution protects, the prevalence of the illegal police practice at issue,

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<sup>279</sup> *Mosley*, 454 F.3d at 251.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* ("[A]nonymous tips do not provide sufficient justification for an investigatory stop.").

<sup>282</sup> *Id.* at 251-52.

<sup>283</sup> *Id.* at 252.

<sup>284</sup> *Id.* at 251.

<sup>285</sup> *See id.* at 252-60.

<sup>286</sup> *Id.* at 267; *see also supra* notes 52-55 and 114-15 and accompanying text; Denniston, *supra* note 4 ("[T]he Court made clear that its views may be changing on the value of the exclusionary rule in deterring police misconduct.").



the deterrent value of the suppression remedy, and the likely practical effects of a particular rule.<sup>287</sup>

Asserting that suppression would serve the Fourth Amendment's purpose, Judge Fisher then returned fire to the newly reopened debate over the necessity of the exclusionary rule in light of alternative remedies:

While the Supreme Court *may be right* about the increased professionalism of police and the robustness of the § 1983 plaintiffs' bar, we cannot say that either racial profiling or reliance on anonymous tips has declined in frequency in recent years, *or that civil lawsuits will adequately deter such practices*. Nor can we say that the various other categories of cases that give rise to passenger suppression motions are rare, decreasing, *sufficiently internally disciplined, or otherwise deterred*.<sup>288</sup>

Because Judge Fisher found the alternative remedies to suppression to be inadequate, and thus found the need for deterrence to be great, he held that suppression was appropriate.<sup>289</sup>

Judge Fisher's opinion in *Mosley* is remarkable for several reasons. First, he explicitly recognizes that the scope of the exclusionary rule will change over time.<sup>290</sup> Second, although he refers to the balancing test from *Hudson*,<sup>291</sup> he focuses on the need for deterrence without almost any discussion of the social costs of the exclusionary rule.<sup>292</sup> While *Mosley* states that it is applying

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<sup>287</sup> *Id.* at 268 (citing *Hudson v. Michigan*, 126 S. Ct. 2159, 2166-71 (2006)). Judge Fisher performed this balancing in the context of his causation analysis. *See id.* at 267 ("The Supreme Court has just this Term reiterated that the exclusionary rule was founded on, and is grounded in, the continuing exercise of pragmatic judicial supervision of the law enforcement activities of the executive branch, effectuated by expansion and contraction of the bubble of proximate cause as courts face particular concrete factual situations." (citing *Hudson*, 126 S. Ct. at 2159)). Other courts have inserted *Hudson*'s costs-benefits analysis into the analysis of causation. *See infra* notes 327-28 and accompanying text. If courts continue to consider the costs of suppression when examining causal attenuation, likely fewer motions to suppress will be granted.

<sup>288</sup> *Mosley*, 454 F.3d at 268 (emphasis added).

<sup>289</sup> *Id.* at 268-69.

<sup>290</sup> *Id.* at 267-68 ("As the social context of law enforcement evolves, so too does the exclusionary rule."). Interestingly, at the conclusion of his discussion of *Hudson*, Judge Fisher stated, "Justice Scalia's opinion epitomizes such pragmatic balancing, 'interpreting the Constitution in light of its own practical concern for an active liberty that is itself a practical process.'" *Id.* at 269 (quoting STEPHEN BREYER, *ACTIVE LIBERTY* 74 (2005)). Given that Judge Fisher appeared to balance only the benefits, and not the costs, of suppression, the balancing to which Judge Fisher refers may not be that which Justice Scalia intended.

<sup>291</sup> *See supra* note 286 and accompanying text.

<sup>292</sup> *See supra* text accompanying note 288.

*Hudson*, it is essentially applying Justice Breyer's preferred test for suppression: evidence should be suppressed if it will result in appreciable deterrence.<sup>293</sup>

Finally, and most significantly, Judge Fisher rejects the existence of alternative remedies.<sup>294</sup> Although arguably he rejects only that alternative remedies exist in the context of unlawful traffic stops, his reasoning is not limited to this narrow context. By stating that the Supreme Court "may be right,"<sup>295</sup> he implies that the Supreme Court might be wrong in its conclusions about the adequacy of remedies.

Just as Justice Scalia's opinion reopens the debate over the necessity of the rule in light of the existence of alternative remedies,<sup>296</sup> Judge Fisher's opinion in *Mosley* enters the debate, respectfully. Considering Judge Fisher's opinion together with the fact that judges have relied on *Hudson*'s social costs analysis to limit the exclusionary rule,<sup>297</sup> but have not relied on the suggestion that alternative remedies exist to do the same,<sup>298</sup> suggests that the judiciary is more comfortable with Justice Scalia's social costs analysis and less so with his alternative remedies analysis. It may also suggest that courts will not accept *Hudson*'s alternative remedies, at least without an expansion of those remedies by the Supreme Court.

### C. *Hudson Creates a Presumption Against Suppression*

Although courts are uncomfortable with *Hudson*'s alternative remedies,<sup>299</sup> they have relied on *Hudson* rather extensively for the proposition that suppression should be the "last resort."<sup>300</sup> These cases appear to derive from *Hudson* a presumption against suppression.<sup>301</sup>

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<sup>293</sup> See *supra* note 236 and accompanying text.

<sup>294</sup> See *supra* text accompanying note 288.

<sup>295</sup> *Mosley*, 454 F.3d at 268.

<sup>296</sup> See *supra* Part VI.A.

<sup>297</sup> See *infra* Part VI.D.

<sup>298</sup> *Mosley* appears to be the only opinion referring to this portion of Justice Scalia's opinion.

<sup>299</sup> See *supra* Part VI.B.

<sup>300</sup> See, e.g., *United States v. Herring*, 492 F.3d 1212, 1217 (11th Cir. 2007) (holding that suppression was not appropriate based on good faith exception); *United States v. Forrester*, 495 F.3d 1041, 1050, 1052 (9th Cir. 2007) (holding, in part, that suppression of evidence seized in alleged violation of federal pen-register statute was not appropriate); *United States v. Grey*, 491 F.3d 138, 156-57 (4th Cir. 2007) (holding that witness's testimony was admissible because it was voluntary); *United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006) (holding that exclusionary rule not appropriate for statutory violation of immigration laws); *United States v. Sells*, 463 F.3d 1148, 1154-55 (10th Cir. 2006) (reaffirming severance doctrine); *United States v. Hill*, 459 F.3d 966 (9th Cir. 2006) (holding that suppression of evidence of child pornography was not appropriate even though "wholesale seizure" that occurred was unlawful); *United States v. Atwell*, 470 F. Supp. 2d 554, 578-79 n.39 (D. Md. 2007) (stating that unconstitutional extra-jurisdictional arrest might not require suppression because suppression is a "last resort" under *Hudson*, and the costs under the *Calandra* balancing test do not outweigh the benefits); *United States v. Reyes-Bosque*, 463 F. Supp. 2d 1138, 1146 (S.D. Cal. 2006) (stating that even if search was pursuant to an un-

Professor Chemerinsky states that Justice Scalia places “the presumption against the application of the exclusionary rule” and that prior to *Hudson* the Court had not placed the presumption against suppression.<sup>302</sup> Neither Justice Scalia nor Professor Chemerinsky cites support for their competing propositions on the presumption for or against suppression.<sup>303</sup> In reality, however, *Hudson* does appear to create a presumption against suppression. Of a survey of cases citing the “last resort” language,<sup>304</sup> all but one denied the defendant’s motion to suppress, in whole or in part, or stated in dicta that the court would have an alternate ground to deny the motion in reliance on *Hudson*.<sup>305</sup>

#### D. Courts Have Extended *Hudson* Beyond Knock-and-Announce

Although courts may be uncomfortable with the existence or adequacy of *Hudson*’s alternative remedies, courts nonetheless rely on *Hudson* to limit the exclusionary rule outside of the knock-and-announce context. Courts have cited *Hudson*’s application of the *Calandra* balancing test to suggest limitation of the exclusionary rule in dicta<sup>306</sup> and to hold against suppression beyond the knock-

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constitutional, warrantless entry, suppression may not be appropriate where the law enforcement officer was attempting to corroborate defendant’s story); *United States v. Diaz*, No. CR 05-0167 WHA, 2006 WL 3193770, at \*3 (N.D. Cal. Nov. 2, 2006) (holding that second arrest was sufficiently attenuated from initial unlawful search that suppression was not appropriate as to items seized pursuant to subsequent arrest); *United States v. Marzook*, 435 F. Supp. 2d 778, 788, 794 (N.D. Ill. 2006) (holding that search fell “within the foreign intelligence exception to the Fourth Amendment’s general warrant requirement”). The “last resort” language comes from Justice Scalia’s majority opinion. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006) (“Suppression of evidence, however, has always been our last resort, not our first impulse.”).

<sup>301</sup> See *infra* note 302 and accompanying text.

<sup>302</sup> See Chemerinsky, *supra* note 8, at 20.

<sup>303</sup> See *id.*; *Hudson*, 126 S. Ct. at 2163. Although the Author does not examine the competing theories on the presumption for or against suppression, the Supreme Court has used language that might imply a presumption against suppression in *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.”).

<sup>304</sup> See cases cited *supra* note 300.

<sup>305</sup> The cases denying the motion to suppress in all respects include *Herring*, 492 F.3d at 1217; *Forrester*, 495 F.3d at 1050; *Grey*, 491 F.3d at 157; *Abdi*, 463 F.3d at 556; *Reyes-Bosque*, 463 F. Supp. 2d at 1145-46; *Diaz*, 2006 WL 3193770, at \*3; *Marzook*, 435 F. Supp. 2d at 788, 794. Two cases suppressed the evidence only in part, severing the valid portion of the search and seizure from the unlawful portion. See *Sells*, 463 F.3d at 1154-55; *Hill*, 459 F.3d at 977. In *Atwell*, 470 F. Supp. 2d at 578-79 n.39, the court held that no constitutional violation had occurred but strongly suggested that suppression nonetheless would not have been appropriate, partly in reliance on *Hudson*’s presumption against suppression. Of the cases surveyed, only in *United States v. Klebig*, No. 06-CR-64, 2006 WL 2038366, at \*1 (E.D. Wis. July 20, 2006) did a court grant the motion to suppress while relying on *Hudson*’s presumption against suppression. *Id.* at \*11-12.

<sup>306</sup> See *United States v. Elder*, 466 F.3d 1090, 1091 (7th Cir. 2006) (citing to *Hudson*’s discussion of social costs of exclusionary rule for the proposition that the rule be limited to searches conducted without probable cause, regardless of the warrant requirement); *United States v. Harju*, 466 F.3d 602, 605-06 & n.2 (7th Cir. 2006) (discussing *Hudson*’s balancing test in dicta before

and-announce context.<sup>307</sup> Cases relying on *Hudson* to limit the exclusionary rule, however, do so through particular reliance on the social costs of suppression, without examining the existence of alternative remedies.

Judge Easterbrook's short opinion in *United States v. Elder* may be portentous regarding the impact of *Hudson* on the exclusionary rule beyond knock-and-announce.<sup>308</sup> The defendant appealed the denial of a motion seeking to suppress evidence of methamphetamine manufacturing seized during a warrantless search of an outbuilding pursuant to a 911 call.<sup>309</sup> The panel disposed of the appeal in a single paragraph of reasoning, determining that the officers acted reasonably in light of "considerations of safety" that created exigent circumstances making a warrant unnecessary.<sup>310</sup>

What is striking, however, is what Judge Easterbrook suggests in dicta about the exclusionary rule and the inevitable discovery doctrine. The inevitable discovery doctrine admits evidence that "would ultimately or inevitably have been discovered even if no violation of any constitutional or statutory provision had taken place,"<sup>311</sup> because the deterrence benefit would not outweigh the social costs of suppression.<sup>312</sup> In the case of a warrantless search pursuant to probable cause, courts generally require the prosecution to show by a preponderance of the evidence that the steps to obtain the warrant have been taken before the search is executed.<sup>313</sup> Where officers have probable cause and can obtain a warrant, but they choose not to, courts generally will not apply the inevitable discovery doctrine because doing so would undermine the historical preference for warrants.<sup>314</sup>

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proceeding to find that the good-faith exception applied to the facts of the case); *United States v. Abdi*, 463 F.3d 547, 556 (6th Cir. 2006) (referring to *Hudson*'s balancing of social costs against deterrence benefits to support the proposition that "there is no exclusionary rule generally applicable to statutory violations").

<sup>307</sup> See cases cited *infra* note 321.

<sup>308</sup> 466 F.3d at 1091.

<sup>309</sup> *Id.* at 1090.

<sup>310</sup> *Id.* at 1091.

<sup>311</sup> *Nix v. Williams*, 467 U.S. 431, 434 (1984).

<sup>312</sup> *Murray v. United States*, 487 U.S. 533, 544-51 (1988) (Marshall, J., dissenting).

<sup>313</sup> *Elder*, 466 F.3d at 1091 ("The usual understanding of that doctrine is that the exclusionary rule should not be applied when all the steps required to obtain a valid warrant have been taken before the premature search occurs."); Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 85 (1992) (asserting that in *Nix v. Williams* the majority "require[ed] that the alternative investigation must have at least been started for the exception to apply.").

<sup>314</sup> See *United States v. Allen*, 159 F.3d 832, 841 (4th Cir. 1998) ("[W]hen evidence could not have been discovered without a subsequent search, and no exception to the warrant requirement applies, and no warrant has been obtained, and nothing demonstrates that the police would have obtained a warrant absent the illegal search, the inevitable discovery doctrine has no place."); *United States v. Cherry*, 759 F.2d 1196, 1206 (5th Cir. 1985) (declining to apply the inevitable discovery doctrine "because at the time of the warrantless search the agents could have obtained a warrant but had made no effort to do so"); *United States v. Torres*, 274 F. Supp. 2d 146, 161

Judge Easterbrook suggested that it “would be a good development” to extend the inevitable discovery doctrine to all searches where probable cause exists.<sup>315</sup> The effect would be to limit the exclusionary rule’s reach to “searches [executed] without probable cause,” whether or not the search was otherwise unlawful.<sup>316</sup> In extending this broad invitation, Judge Easterbrook referred to the Fourth Amendment and to *Hudson*’s weighing of the high social costs of suppression.<sup>317</sup>

Judge Easterbrook’s suggestion would reject the historical preference for warrants.<sup>318</sup> He does conclude the opinion noting that the United States Supreme Court would have to make such a broad change in precedent.<sup>319</sup> Despite this limiting language, Judge Easterbrook’s suggestions in *Elder* suggest that courts are willing to apply *Hudson*—balancing of costs and benefits, with particular emphasis on Justice Scalia’s strong language about social costs—to limit the exclusionary rule in contexts beyond knock-and-announce.<sup>320</sup>

Although Judge Easterbrook spoke expansively, his statements were made expressly in dicta. Other courts have actually balanced the costs and benefits of exclusion, with particular focus on the costs, to extend *Hudson* beyond its knock-and-announce roots. In three federal appellate decisions, panels have found suppression inappropriate when balancing the costs and benefits,<sup>321</sup>

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(D.R.I. 2003) (“In addition to probable cause, the Fourth Amendment requires the intervention of a neutral and detached magistrate. Here, the record is completely devoid of any evidence indicating that the DEA even considered obtaining a warrant.”).

<sup>315</sup> *Elder*, 466 F.3d at 1091.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* Judge Easterbrook stated, “The exclusionary rule comes at such high cost to the administration of the criminal justice system that its application might sensibly be confined to violations of the reasonableness requirement.” *Id.* This statement in and of itself is not remarkable. See, e.g., Amar, *First Principles*, *supra* note 27, at 801-11 (proposing that all searches should be examined for reasonableness only); cf. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968) (applying a test of reasonableness to determine whether a stop-and-frisk encounter violated the Fourth Amendment). What is remarkable is his reliance on *Hudson* in suggesting that courts do away with the preference for warrants. See *infra* note 318 and accompanying text.

<sup>318</sup> See *supra* note 314 and accompanying text.

<sup>319</sup> *Elder*, 466 F.3d at 1091 (“But whether to trim the exclusionary rule in this fashion is a decision for the Supreme Court rather than a court of appeals.”).

<sup>320</sup> See *supra* note 306.

<sup>321</sup> *Mosby v. Senkowski*, 470 F.3d 515, 522-33 (2d Cir. 2006) (applying *Hudson*’s balancing test and concluding that “the social costs of suppressing [the defendant’s] voluntary confession to two homicides would have been considerable,” and as such, holding that “custodial confession was too attenuated from his warrantless arrest to require suppression”); *United States v. Hill*, 459 F.3d 966, 977 (9th Cir. 2006) (citing *Hudson*’s balancing test and holding that suppression of evidence of child pornography was not appropriate even though “wholesale seizure” that occurred was unlawful; *United States v. Sells*, 463 F.3d 1148, 1154-55 (10th Cir. 2006) (citing *Hudson*’s balancing test in re-affirming the severance doctrine—“whereby valid portions of a warrant are severed from the invalid portions and only materials seized under the authority of the valid portions, or lawfully seized while executing the valid portions, are admissible”); see also *United States v. Olivares-Rangel*, 458 F.3d 1104, 1123-24 & n.3 (10th Cir. 2006) (Baldock, J., dissent-

and in at least one federal District Court case, the court concluded that suppression was appropriate despite the costs.<sup>322</sup> These cases show that courts applying *Hudson* outside of knock-and-announce appear to balance the costs and benefits, with a focus on the general social costs, but the same courts are not relying on Justice Scalia's discussion of decreased need for the exclusionary rule.

For example, *Mosby v. Senkowski* relied on *Hudson*'s application of the balancing test to conclude that Mosby's custodial interrogation after an unlawful arrest was lawfully admitted.<sup>323</sup> Officers had unlawfully arrested<sup>324</sup> Mosby for selling cocaine, and they were holding him in a squad car when a passerby's comment connected Mosby to an unrelated crime, an unsolved double homicide.<sup>325</sup> As a result, four witnesses to the homicides identified Mosby, after which he confessed.<sup>326</sup>

In determining whether the confession should be suppressed, the court examined how attenuated the confession was to the unlawful arrest.<sup>327</sup> As part of the analysis of the attenuation between Mosby's unlawful arrest and his subsequent identification and confession,<sup>328</sup> the court applied *Hudson*'s cost-benefits balancing test, with an emphasis on the social costs:

Suppressing Mosby's confession would be *unlikely to deter* future police misconduct, since the police—at the time they entered 46 Costar to make a routine drug arrest—could not have anticipated the fortuitous chain of events that ultimately connected Mosby to the homicides. . . . In addition, the *social costs*

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ing) (discussing *Hudson*'s balancing test and concluding that suppression of fingerprints and alien file obtained through unlawful arrest should not be suppressed because the social costs outweigh the deterrence benefits).

<sup>322</sup> United States v. Srivastava, 444 F. Supp. 2d 385 (D. Md. 2006) (holding suppression appropriate despite the social costs); see also United States v. Mosley, 454 F.3d 249, 267-69 (3d Cir. 2006) (applying *Hudson*'s balancing test and determining that evidence seized pursuant to an illegal traffic stop should be suppressed as to all passengers) (discussed *infra* Part VI.B).

<sup>323</sup> 470 F.3d at 523. *Mosby* entailed an appeal of a denial of writ of habeas corpus based on ineffective assistance of counsel. *Id.* at 517. As such, Mosby needed to show that counsel's failure to seek suppression of his confession was "objectively unreasonable." *Id.* at 519 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Therefore, the case has questionable precedential value. However, given the panel's analysis of the balancing of social costs against deterrence benefits, and the strong language used in its analysis, *id.* at 523, this case is useful in discussing *Hudson*'s effect on the future of the exclusionary rule.

<sup>324</sup> The arrest was unlawful because, without a warrant and without consent, the officers entered the home where Mosby was residing to affect the arrest. *Id.* at 519-20.

<sup>325</sup> *Id.* at 517-18.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 522-23.

<sup>328</sup> *Id.* ("[T]o evaluate attenuation in the context of a custodial confession following a warrantless home arrest, we [examine the following factors:] administration of Miranda warnings, temporal proximity of the arrest and statement, intervening circumstances, and the purpose and flagrancy of the official misconduct . . ." (citations omitted)).

of suppressing Mosby's voluntary confession to two homicides would have been *considerable*.<sup>329</sup>

The court weighed the social costs, finding them "considerable," such that the deterrence value did not outweigh them.<sup>330</sup> The court's willingness to apply *Hudson's* balancing of costs and benefits outside of knock-and-announce, even outside of an unlawful search, shows that the effect of *Hudson* may be far-reaching.

*Mosby v. Senkowski* contrasts with the decision of the District Court for the District of Maryland in *United States v. Srivastava*.<sup>331</sup> In *Srivastava*, the court held that evidence seized during execution of a search warrant fell outside the scope of the warrant's description of items to be seized.<sup>332</sup> In determining whether any exceptions to the exclusionary rule applied, the court began by citing *Hudson's* balancing of the social costs against the deterrence benefits.<sup>333</sup> The court reviewed existing exceptions to the exclusionary rule and concluded that none applied.<sup>334</sup> In so concluding, the court recognized the "mighty toll" that the suppression had exacted on the case, but stated, "this is the rare and unfortunate case where such a price must be paid."<sup>335</sup> In finding the costs warranted, the court did not examine the deterrence rationale of the exclusionary rule, but rather cited *Mapp v. Ohio* for the proposition that *judicial integrity* outweighed the social costs.<sup>336</sup>

*Srivastava's* deference to judicial integrity, in light of the weighty costs of suppression, raises a potential side-effect of *Hudson's* broad language: courts may look for other factors to place on the benefits side of balance in order to offset the weighty cost of suppression. Justice Scalia stressed the costs of exclusion, while downplaying the need for deterrence in light of alternative remedies.<sup>337</sup> The broad conclusions that he reached on the costs and benefits rightfully raise the question of how a court could ever find the deterrence costs to

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<sup>329</sup> *Id.* at 523 (emphasis added) (citations omitted).

<sup>330</sup> *Id.*

<sup>331</sup> 444 F. Supp. 2d 385 (D. Md. 2006). The case of *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006), discussed *supra* Part VI.B, also held that suppression was appropriate, despite reliance on *Hudson*.

<sup>332</sup> *Srivastava*, 444 F. Supp. 2d at 396.

<sup>333</sup> *Id.* at 401.

<sup>334</sup> *Id.* at 401-12 (holding as inapplicable inevitable discovery doctrine and independent source doctrine).

<sup>335</sup> *Id.* at 412.

<sup>336</sup> *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643, 659 (1961)). *But see* *People v. Galland*, 52 Cal. Rptr. 3d 799, 808 (Cal. App. 2006) (holding, on due process grounds, that deterrence benefits outweighed social costs, thus warranting suppression of evidence where judge allowed affiant to retain original search warrant affidavit), *review granted and opinion superseded by* 156 P.3d 1015 (Cal. 2007).

<sup>337</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2163-67 (2006).

outweigh the benefits.<sup>338</sup> In *Srivastava*, the District Court overcame the costs by resurrecting the imperative of judicial integrity, which the Supreme Court all but rejected as a rationale for the exclusionary rule thirty years ago.<sup>339</sup> Thus, as a result of *Hudson*, courts may add to the benefits side of the balance not only the value of deterrence, but also the imperative of judicial integrity and other non-deterrence rationales that the Supreme Court has largely disregarded.<sup>340</sup>

*Mosby v. Senkowski* and *United States v. Srivastava* show that courts are relying on *Hudson*'s balancing of costs and benefits, but at the same time they demonstrate that courts have considerable discretion in determining what goes onto different sides of the scale. While it appears that courts are willing to weigh the grave social costs of the exclusionary rule, the reference to judicial integrity in *Srivastava* shows that courts are left with great discretion in their analysis.

## VII. CONCLUSION

Justice Scalia's opinion in *Hudson* has invigorated the debate over the future of the exclusionary rule. Its application of the *Calandra* balancing test and its consideration of the general social costs were not novel. Examining the exclusionary rule cases of *Calandra*, *Leon*, and *Lopez-Mendoza*, precedent supports *Hudson*'s application of the balancing of deterrence benefits against social costs. However, *Hudson*'s discussion of alternative remedies has reopened the debate over the necessity of the exclusionary rule; the focus on reevaluation of the deterrence benefits, in light of alternative remedies and the changing face of law enforcement in the years since *Mapp*, is logical and comports with common-sense. The exclusionary rule may not survive this debate.

The examination of the cases relying on *Hudson* shows that there are a variety of issues remaining before this debate is resolved. Primary among these is how law enforcement will react to the diminishing scope of the rule. Their reaction to *Mapp* suggests that law enforcement may have less incentive to respect Fourth Amendment rights—at least the knock-and-announce rule—post-*Hudson*,<sup>341</sup> unless and until alternative remedies become a concern to law enforcement.

In the wake of *Hudson*, what is left to be determined is how the constitutional guarantee of the knock-and-announce rule will be defined without suppression hearings to litigate the details. Will civil actions be adequate to provide deterrence against violations of this right? Will the United States Supreme

<sup>338</sup> Cf. *supra* notes 216-25 and accompanying text (discussing Justice Breyer's rejection of the *Calandra* balancing test as applied in *Hudson*'s majority opinion).

<sup>339</sup> See *Stone v. Powell*, 428 U.S. 465, 485-86 (1976).

<sup>340</sup> See *supra* note 61 (discussing various non-deterrence rationales for the exclusionary rule).

<sup>341</sup> See *Kamisar*, *supra* note 25, at 123-26 (discussing law enforcement reactions to *Mapp* and suggesting that their reactions show that alternative remedies are not effective); *Fields*, *supra* note 243 (relating positive reactions of police officers to a post-*Hudson* knock-and-announce ruling).



Court or the various United States Courts of Appeals further extend *Hudson* to limit areas where the exclusionary rule has been applied for the last half a century?

Some of these questions will be answered by the test of time, but future research is warranted in several areas. Empirical evidence about the effectiveness of civil suits in the knock-and-announce context would help to understand whether the *Hudson* majority's reasoning is warranted. Furthermore, to understand if the professionalism of police forces will protect against violations of the knock-and-announce rule, research into law enforcement policies, official and unofficial, in the wake of *Hudson* would help to understand whether the law enforcement professionals of the twenty-first century have taken *Hudson* as an invitation to disregard knock-and-announce requirements, or whether they have continued to operate under the same professional standards predating June 2006.<sup>342</sup> Evidence of changes, or lack thereof, in these procedures would also either buttress or undermine Justice Scalia's reasoning in *Hudson* regarding the necessity of the exclusionary rule to deter unlawful police behavior.

Note that neither of these suggestions, even if they came out to show that the *Hudson* majority's "judicial understanding" was incorrect, would militate toward a holding that the exclusionary rule applies to knock-and-announce violations.<sup>343</sup> There is still the issue of causation, which most commentators have not attacked in any fashion even nearing their attack of *Hudson*'s discussion of the balancing test. What the suggested research will provide, however, is an empirical foundation upon which the United States Supreme Court can appropriately build their present-day "judicial understanding" regarding the exclusionary rule. With better, up-to-date information, the Court can base future decisions that build on *Hudson* to understand what the need is today for the exclusionary rule as a deterrent against unlawful police conduct. If anything is "blowing in the wind,"<sup>344</sup> it is that the Court is prepared to reevaluate the assumptions underlying the decision in *Mapp*, and justices are prepared to debate alternative remedies to the exclusionary rule. The key question is what information will be available for the United States Supreme Court when the time arrives.

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<sup>342</sup> Professor Blair, who takes issue with the increased professionalism of police forces as a rationale in *Hudson*, does not appear to go to the level of research that might be required to understand whether this rationale is truly effective. See Blair, *supra* note 14, at 759-60.

<sup>343</sup> See *supra* Part IV.A.

<sup>344</sup> See *supra* note †.

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